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UNITED STATES MERIT SYSTEMS PROTECTION BOARD
Washington, D.C. 20419

MS 1.11:

United States Merit Systems Protection Board

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APRIL CASES

ADVERSE ACTIONS

THOMAS E. DRAYTON, SR. v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Docket No. AT07528110105)
April 6, 1982

1.110; 1.120; 1.343; 1.344; 1.400; 1.410; 1.420; 3.120; 14.700

Appellant was removed based on a charge of fraud through the unauthorized use of a U.S. Government credit card. The agency charged the appellant with fraud for using a government credit card on two occasions to pay for gasoline that was put into his personal vehicle. The appellant did not deny this conduct but offered an explanation. The presiding official upheld the removal and the appellant petitioned for review of the presiding official's decision.

The explanation offered by the appellant was that on one of the occasions he used a government vehicle and, while in the field, he discovered the car was low on fuel. He filled the vehicle with gasoline and then he was told that he could not charge the purchase. The service station owner, by affidavit, testified that he does not accept credit cards. Appellant paid out of his own cash and, as a method of reimbursement, later that day put an amount equal to the payment he had made in his own vehicle and charged it to the government credit card at a gasoline station that would accept the credit card. Appellant contended that all circumstances in the second incident were the same except that on this occasion the credit card was missing from its case in the government vehicle. The contention was corroborated by the affidavit of the second service station owner.

Appellant's first explanation of using this method for reimbursement was that officials in the agency's finance branch told him that he could not be reimbursed from the imprest fund since he was cashier. Therefore, he felt that he had no alternative but to buy gasoline with the government credit card for reimbursement. His second explanation was that he had a memo from a supervisory attorney authorizing him to use this reimbursement procedure. The Board found neither of these explanations adequate.

The Board, as well as the presiding official, found that there was a method whereby appellant could have been reimbursed by the agency's motor pool. Although appellant was unaware of this procedure, the Board felt that he could have learned about it through inquiry. In addition, the Board found that the memorandum did not authorize the procedure appellant followed. The memorandum authorized him to use his personal vehicle on government business, and to use the credit card for gasoline purchases.

The Board has held that the element of knowledge necessary to sustain a charge of fraud is established when the person in question ought to know, has a duty to know, or has the means of knowing the truth. *Barrett v. Air Force*, MSPB Order No. DC07528010046 (February 20, 1981). The Board felt that appellant knew that he was using an unofficial method to reimburse himself and, therefore, found it necessary to falsify credit card receipts to effect this method (on both occasions the license plate number of appellant's personal vehicle had been scratched out and the license plate number of a government vehicle had been entered). The Board, therefore, sustained the charge.

However, the Board found the penalty of removal unreasonably harsh. The Board held that the seriousness of fraud against the government was mitigated by the surrounding circumstances and that the appellant did not profit from his conduct, but, instead, was merely trying to get repaid for expenditures that he had made on behalf of the agency. However, the Board felt that the offense entailed a serious lack of judgement on the appellant's part, and that a 30-day suspension was the maximum reasonable penalty for his misconduct.

Accordingly, the initial decision was affirmed as modified and the agency was ordered to cancel appellant's removal action and substitute a 30-day suspension without pay.

CHARLES B. HICKMAN v. DEPARTMENT OF JUSTICE (Docket No. DA075209113)
April 19, 1982

1.330; 1.340; 1.346; 1.400; 4.120; 4.125; 8.230

Appellant was removed from a position with the federal prison system on charges of removing contraband from the grounds of a federal correctional institution and of theft of money from an inmate. The presiding official, in the initial decision, sustained the first charge only. He reversed the agency action, stating that removal of appellant was too harsh in relation to the charge sustained and thus did not promote the efficiency of the service. In an analysis of the facts, the presiding official found that appellant was authorized to collect and hold the prisoner's money and that he had removed it from the prison to ensure its safekeeping. Therefore, the presiding official did not sustain the charge of theft.

In its petition for review, the agency argued that the presiding official incorrectly interpreted 5 U.S.C. 7513 and 18 U.S.C. 4082 in concluding that appellant's removal of contraband from the prison did not justify the agency's decision to remove the him.

The Board agreed with the presiding official's decision sustaining the charge that appellant removed contraband from the prison. The Board felt that the propriety of the penalty imposed by the agency in relation to the charge sustained had to be reviewed in light of the Board's decision in *Douglas v. Veterans Administration*, MSPB Order No. AT075299006 (April 10, 1981). In *Douglas*, the Board held that it had authority to mitigate penalties when it determined that the agency-imposed penalty was clearly excessive, disproportionate to the sustained charges, arbitrary, capricious, or unreasonable.

In this case, the Board believed the penalty of removal to be reasonable and appropriate. The Board also believed that the most important consideration in this case was that appellant was employed as a law enforcement official, a position of great trust and responsibility, and thus had to conform to a higher standard of conduct than non-law enforcement employees.

The associate warden stated that, in his opinion, this incident destroyed appellant's credibility with the prisoners. The severity of appellant's misconduct was also reflected by 18 U.S.C. §1791 which potentially provides for a ten year prison sentence for removing contraband from a prison.

Accordingly, the presiding official's decision was reversed and the agency penalty removing appellant was affirmed.

ALFREDO A. IBARRA v. DEPARTMENT OF THE AIR FORCE (Docket No. SF07528010433)
April 14, 1982

1.363; 1.369; 1.400; 1.410; 8.230; 10.1112; 10.130; 14.700

Appellant was removed from the position of civilian guard at a military institution based on a charge that he had failed to report for weapons qualification training as directed by his superiors. In determining the penalty, the agency also considered an earlier reprimand issued to appellant for an unrelated type of offense. The presiding official affirmed the removal.

In his petition, appellant first attempted to reargue the merits of the charge against him, contending that the evidence did not support insubordination. However, based on the Board's examination of the initial decision and the record, the Board found no error in the presiding official's finding. Appellant's other contention was that the penalty was too severe and requested the Board to reduce it.

The record revealed that appellant was required to carry a revolver in the course of his duties. In order to be authorized to carry his revolver, appellant was required annually to complete weapons qualification training successfully, which included range firing his revolver. Appellant had failed his weapons qualification and was twice ordered, in writing by his military supervisors, to report for weapons qualification. He refused to report, forming the basis of the specifications supporting the charge of insubordination.

Appellant contended that any orders from his military supervisors, at that time, were not lawful orders because he had a valid authorization from the installation commander. He argued that his military superiors were attempting to countermand their superior's orders. Appellant also asserted that he and two others who had failed weapons qualification were given a 90-day extension and that this was the basis for his refusal to attempt to qualify before the expiration of the extension.

In considering the appropriateness of the penalty, the presiding official determined that although two incidents of alleged insubordination were cited, the charge must be considered as one offense. Since no disciplinary action had been imposed for the first incident, the presiding official considered that the penalty range for a first offense, which was reprimand to removal, as set out in the agency's penalty guide, was applicable. The Board agreed, stating that an agency cannot increase the severity of the penalty in this or similar types of cases where it may reasonably anticipate that the order will not be obeyed. The two incidents of disobedience were therefore merged into one offense for the purpose of determining the maximum appropriate penalty. In considering all relevant factors in this case, the Board concluded that the penalty of removal was unreasonable and that a 60-day suspension would be the maximum reasonable penalty.

Accordingly, the initial decision was affirmed as modified and the agency was ordered to cancel the removal and substitute a 60-day suspension in its place.

ANNUITIES

CHARLES E. ANDERSON v. OFFICE OF PERSONNEL MANAGEMENT (Docket No. AT08318110438)

April 7, 1982

1.111; 14.000000; 15.110; 15.200; 15.300

The Office of Personnel Management (OPM) petitioned for review of a Regional Office decision reversing its determination that appellant was not eligible for a discontinued service annuity. (At issue was whether appellant resigned involuntarily, after being faced with reassignment, and thus was entitled to a discontinued service annuity, or whether he left voluntarily and was not, therefore, so entitled.) The presiding official in his consideration of the case applied a sanction against OPM pursuant to 5 C.F.R. §1201.43 and struck all OPM submissions. The presiding official only considered the OPM reconsideration decision, concluded that OPM had not demonstrated the basis for its reconsideration decision, and found that appellant was entitled to discontinued service annuity.

In its petition for review, OPM asserted that the record demonstrated that the presiding official's decision was erroneous. OPM argued again that the appellant's resignation was voluntary, that the reassignment was excessively forceful, and that the appropriate remedy would be cancellation of the separation as a violation of part 752.

The Board stated that the sanction applied against OPM by the presiding official was proper and appropriate, that the agency twice failed to comply with the presiding official's direction to submit the record, and was well over a month late responding to the second order. The Board has consistently held that the sanction of striking the agency submission is warranted under these circumstances. *See, e.g. Julson v. Office of Personnel Management*, MSPB Order No. CH831L09013 (September 22, 1981).

In determining that the presiding official's interpretation of the law and guidance provided in FPM Supplement 831-1, was not erroneous, the Board noted 5 U.S.C. §8336(d) which provides that an employee who has attained certain age and service requirements and who is separated involuntarily, except by removal for cause, is entitled to an annuity. FPM Supplement 831-1, S11-2(e) provides that separation of an employee who receives a notice that reassignment is being directed outside the commuting area is involuntary. Thus, agreeing with the presiding official, the Board found this guidance applicable.

The Board found that OPM's assertion that the resignation was in fact voluntary because it was not coerced was misplaced in this case, since the issue dealing with voluntariness as pertaining to separation in lieu of an adverse action was not dealt with here. The Board found, rather, that the circumstances surrounding the separation itself and not the means effecting it were dealt with. The Board concluded that it was therefore immaterial whether appellant desired to submit his resignation. The Board felt that what was relevant was the directed reassignment and the separation in lieu thereof.

Furthermore, the Board found that whether or not the agency ratified the resignation was likewise irrelevant. As stated at 5 C.F.R. §715.202(a), an employee is free to resign at any time, to set the effective date, and to have the reasons for his resignation entered in the official records. 5 C.F.R. §715.202(b) states that withdrawal is at the discretion of the agency before it becomes effective. Courts have held that resignation results in the employee's complete separation which after it becomes effective may not be revoked at the employee's option. The Board held that a resignation is an employee-initiated action and there is nothing in law or regulation that permits an agency to revoke resignations at will after their effective date.

Finally, with respect to the allegedly forceful nature of the directed reassignment, the Board again noted that this concern was not relevant to the matter of whether the separation was involuntary under the circumstances provided for in law and FPM Supplement 831-1.

The Board found that the facts showed appellant's situation met the criteria for discontinued service annuity and ordered the agency to grant the appellant's discontinued service annuity.

DISABILITY RETIREMENT

CAROLYN J. LIPSCOMB v. OFFICE OF PERSONNEL MANAGEMENT (Docket No. AT831L8110394)
April 6, 1982

4.000000; 4.120; 4.127; 10.1322; 14.400; 15.130; 15.131

Appellant appealed the reconsideration decision of the Office of Personnel Management (OPM) denying her application for disability retirement. Following a hearing, the presiding official issued an initial decision sustaining OPM's disallowance.

In the initial decision, the presiding official found that appellant had not established that her pain nor the causative conditions were totally disabling, and that it was unnecessary to decide whether or not there was a medically caused deficiency in service. The Board has held that the ultimate determination of total disability is to be based on the probative value of *all* of the evidence which includes all evidence relating to the effect of the appellant's condition upon his or her ability to perform in the grade or class of position last occupied.

At the hearing, both treating doctors testified that appellant was totally disabled and otherwise supported and elaborated on their previous explanations of appellant's condition and its effect on her ability to perform the duties of her position. One of the doctor's testified that, based on appellant's job description and her knowledge of appellant's medical condition, the pain would affect the quality and quantity of appellant's work on that job. The doctor also stated that appellant's condition caused a deficiency in her work and that, due to degenerative processes, she believed appellant's condition would not improve but would worsen and that in her opinion appellant was totally disabled.

Based upon the evidence, the Board found that appellant had shown, by a preponderance of the evidence, that she was totally disabled within the meaning of 5 U.S.C. §8331(6) and, therefore, was entitled to a disability retirement annuity under 5 U.S.C. §8337.

Accordingly, the initial decision was reversed and the Office of Personnel Management was ordered to grant appellant's application for disability retirement.

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WILLIAMS, James W., Jr. v. General Services Administration (DE07528210040)

YGLECIAS, Martha J. v. Office of Personnel Management (SF831L8110253)

YODER, Gilbert A. v. Department of the Air Force (DC07528090063ADD)

REQUESTS FOR EXTENSIONS OF TIME DENIED

GOTTLIEB, Morris v. Office of Personnel Management (NY08318210189)

KETCHEM, John C. v. Department of Transportation, Federal Aviation Administration (DA075281F0713)

SKAGGS, Clinton v. Social Security Administration (M-80-8)

ERRATA

AMATO, Thomas v. Department of the Treasury (NY07528210257)

BLOW, Morgan R. v. Department of the Navy (PH07528010150)

FARWELL, Richard H. v. U.S. Postal Service (AT07528110501)

HELLMAN, Donald L. v. Office of Personnel Management (AT360A7990002)

STECHLER, Bernard v. Department of Energy (NY03518210062)

MAY CASES

ADVERSE ACTIONS

LEON ALLEN, et. al. v. DEPARTMENT OF THE ARMY (Docket No. PH07528010126)
May 26, 1982

1.110; 1.120; 1.343; 1.345; 1.371; 1.400; 1.410; 10.114; 14.700

The agency petitioned the Board to review the initial decision which sustained charges against the appellants, but reduced the penalty from removal to a 30-day suspension.

Appellants, according to the undisputed record, falsified travel vouchers. The presiding official reduced the penalty mainly because he concluded that the agency had violated the principle of like penalties for like offenses. Among the agency's contentions in its petition was that this principle was not violated because appellants' actions were "infinitely different" from instances relied on by the presiding official for comparison.

The removal notice stated that appellant Allen had been authorized temporary duty in another location for 26 days beginning January 14. He signed a travel voucher claiming $398.41 reimbursement for lodging when the actual amount was $122. According to the voucher, he left to return to his duty station on February 1. He did not report for work until February 8. Consequently, he was carried as AWOL for this period of time. On reporting to work on February 8, he said that he had left for his duty station that day. He was charged with knowing falsification of travel vouchers. Two other similar cases were consolidated with this case on appeal.

From the record, the Board said it could not conclude that any of the parties were claiming lodging expenses up to February 8. Rather, they had completed their temporary duty early, but did not report back to their duty stations until th authorized 26 days had elapsed. The Board said that the agency could properly rely on the AWOL, misuse of government vehicle, and falsification of travel documents charges in deciding on proper sanctions.

The Board held in *Douglas v. Veterans Administration*, MSPB Order No. AT075299006 (April 10, 1981), that it has the authority to review penalties imposed by the agencies, and to modify penalties it finds to be unreasonable.

The Board has ruled—*Bivens v. Tennessee Valley Authority*, MSPB Order No. AT075219003, (April 14, 1982)—that where the appellant shows that disparate treatment in the imposition of penalties has occurred, the agency will be upheld only if it can prove by a preponderance of the evidence a legitimate reason for the difference in treatment. In this case, the agency said the difference between this and earlier cases was that prior employees had knowingly falsified time and attendance reports, while these appellants had turned in false travel vouchers, were AWOL and misused a government vehicle. However, the Board said that the crux of all these charges was the same, namely, falsification. Also, other employees disciplined were in positions of trust and authority, while these appellants were not. The individuals in the other cases were merely suspended and demoted, not removed.

The Board said that the maximum reasonable penalty for these first offenses was demotion. Accordingly, it affirmed the initial decision as modified by this opinion and order, and ordered the agency to cancel the removals and substitute demotions to the next lowest grade.

JERRY DEAL v. DEPARTMENT OF JUSTICE (Docket No. SL07528010006)
May 10, 1982

1.361; 1.369; 1.400; 1.410; 1.430

Charged with two counts of violating agency regulations concerning outside employment, appellant was removed as Supply Technician at the U.S. Penitentiary in Leavenworth.

The presiding official sustained the first charge of failure to get prior approval of outside employment. As to the second, although appellant's business dealings with his employer did constitute a prohibited conflict of interest, the presiding official found that appellant proved he was treated differently from other employees who were also doing business with the penitentiary. Since disparate treatment is a prohibited personnel practice, the presiding official reversed the second charge, and mitigated the removal of a 30-day suspension based on the one sustained charge.

The Board granted the agency's petition for review.

Appellant, a receiving clerk at the prison commissary warehouse, in partnership with the commissary supervisor set up a catalog company to sell gift items to inmates, and another company—Midwest Wholesale Company—through which the supervisor bought goods to be sold in the commissary. Appellant did not dispute charges that his business relationship was a conflict of interest in that the partnership was selling goods to appellant's employer and, further, that the buyer was his business partner, but alleged that other employees were doing business with the penitentiary and were not disciplined.

According to the record, other employees sold goods to inmates, but they did not benefit from their government jobs in doing so. In this case, however, the Board found that appellant's partnership in Midwest had, as its central purpose, a function so closely related to the duties of his Federal employment that it constituted a prohibited conflict of interest. The Board found that the agency established that other employees who were not disciplined were not in similar situations. Therefore, the Board found that appellant's claim of disparate treatment was lacking in merit.

The Board then looked at the issue of the correctness of the penalty for the two sustained charges. In *Douglas v. Veterans Administration*, MSPB Order No. AT075299006 (April 10, 1981), the Board said it had the authority to mitigate penalties, but it said it did not have the authority to simply substitute its judgment for management's. It found appellant's wrongdoing was a serious breach of trust. Although appellant had almost 17 years service with the penitentiary with no prior disciplinary record, in light of the Government's compelling interest in avoiding conflicts on the part of its employees, and in upholding the integrity of the Federal service, the Board found that removal was not too harsh a penalty. The initial decision was reversed and the removal action sustained.

JERRY A. GILLEY v. DEPARTMENT OF JUSTICE

(Docket No. AT075209155)
May 5, 1982

1.130; 1.367; 1.369; 1.400; 1.410; 10.1322; 14.700

Appellant, a Supervisory Correctional Officer, was reduced in grade from GS-11 to GS-8 and reassigned to another state. The charges were using excessive force against an inmate and failing to preserve evidence. They stemmed from an incident during which appellant went to the assistance of a fellow officer who was trying to subdue an inmate.

In the initial decision, the presiding official found that the agency proved part of the first charge, that is, that appellant had punched the inmate, but that it did not prove he used excessive force. The presiding official also found that the agency had proven the second charge except that he found no evidence that this failure to preserve evidence created a problem in prosecuting the inmate for assaulting the correctional officer. The presiding official reversed the reduction in grade action, finding it too harsh for the single proven charge, but did not decide the issue of reassignment, saying it was not appealable to the Board, and that the agency had not, in fact, transferred appellant.

Both appellant and the agency filed petitions for review.

In considering the agency's petition for review, the Board found no reason to reverse the initial decision, but granted the petition because it wanted to consider the correctness of the penalty the agency had specified.

The Board denied appellant's petition for review. Regarding the proven charge, failure to preserve evidence, the Board found that this charge was supported by a preponderance of the evidence.

As to the penalty, the Board pointed to *Douglas v. Veterans Administration*, MSPB Order No. AT075299006 (April 10, 1981) where it said it would review an agency-imposed penalty to determine whether it was clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious or unreasonable. Noting that a penalty should be selected only after the relevant factors (including proper management responsibility) have been weighed, the Board held that its review would be to assure that the agency conscientiously considered the relevant factors and chose a reasonable penalty.

In this case, the Board said that the most relevant factors were the seriousness of the offense and appellant's disciplinary and work records. It said that whenever an agency's action is based on multiple charges, some of which are not sustained, the Board will carefully consider whether the sustained charges merited the penalty the agency imposed.

Appellant's failures, such as not taking photographs of the scene, did not preclude the prosecution of the inmate for assaulting the correctional officer. Further, the record showed that appellant's work record was satisfactory.

The Board said that although appellant's failure to preserve the evidence was a clear violation of his duty, a 30-day suspension was the maximum reasonable penalty.

Since it found the reduction in grade unreasonable, the Board invalidated the proposed reassignment at the lower grade. The Board affirmed the initial decision as modified, cancelled the reduction in grade, and put a 30-day suspension in its place.

JEFFREY KUFEL v. U.S. POSTAL SERVICE (Docket No. CH07528110245)
May 26, 1982

1.110; 1.311; 1.369; 1.371; 1.400; 1.420; 1.600; 3.130; 3.131; 3.1321

The presiding official sustained appellant's removal based on his being AWOL from November 11 through 29, 1980. Appellant petitioned the U.S. Court of Claims for review. The Board requested and obtained remand.

Appellant is a disabled Vietnam veteran. During employment with the Postal Service—about 18 months—he was absent about 73 percent of the time; at least two absences were without leave (AWOL). In a Letter of Intent dated November 19, 1980, appellant's supervisor notified him that he would be charged as AWOL starting November 11 if he did not acceptably justify such absences within five days from receipt of the letter. Appellant's response letter of November 22 stated he had a lung infection, and included medical documents and a letter previously sent his supervisor. He said he had been told he need not call his duty station daily because he was being placed on leave until further notice. He indicated that he planned to return to work on November 23, and asked that he be immediately advised whether this response was sufficient. He received no response, and on November 29, a notice of proposed removal was issued, listing as reasons (1) failure to report for duty since November 11, and (2) failure to give a satisfactory reply to the Letter of Intent.

On December 16, appellant replied to the notice referring to earlier letters, and attaching medical statements and reports. On December 24, the agency removed appellant, stating that the first charge was fully supported, and making no mention of the second charge.

On the subsequent appeal, the presiding official found that the agency had supported the first charge by a preponderance of the evidence, and that appellant did not demonstrate that he met the definition of a handicapped employee, as he had contended as his affirmative defense.

The presiding official found that appellant's November 19 letter did not adequately document his absence from work, and that appellant was in fact AWOL. However, the Board said this reasoning disregarded the fact that the agency did not rely on the second charge—failure to respond adequately to the Letter of Intent—in its removal decision. Therefore, the Board said that it must conclude that appellant's response to the letter satisfactorily justified his absence from duty, and appellant should not be considered AWOL.

The agency's argument, which the presiding official sustained, was that the removal was because of appellant's absenteeism. However, the Board found that it did not reply on the attendance or performance requirements, but on a specific AWOL charge which was not supported by a preponderance of the evidence. Therefore, the removal action could not be sustained. (*See Johnston v. Government Printing Office*, MSPB Order No. DC075209003, (April 15, 1981)).

Addressing appellant's contention that the agency discriminated against him because of his physical handicap, the Board said that the record was insufficient to support a claim of physical impairment or illness as contemplated by 29 C.F.R. 1613.702(b)(1). Since appellant had worked for the Postal Service for about 18 months before showing signs of respiratory distress, and had failed to prove he was handicapped within the meaning of the regulation, i.e. That his lung condition substantially limited a major life activity, the Board found no evidence sufficient to invoke the Rehabilitation Act of 1973 and its implementing regulations.

Since the agency failed to prove its charges by a preponderance, the Board reversed the initial decision, and ordered cancellation of the removal action.

HARRY LUNDY v. DEPARTMENT OF THE NAVY
(Docket No. PH07528110250)
May 13, 1982

1.110; 1.120; 1.320; 1.400; 1.410; 1.420; 3.1313; 3.1321; 3.1322; 3.133; 11.133; 14.700

Both the appellant and the agency filed petitions for review of the initial decision which reduced appellant's removal to a 60-day suspension.

The agency on September 4, 1980 in a meeting with appellant, his union representative and an agency official, informed appellant that it was thinking of removing him. Appellant had requested leave to be with his daughter for surgery on July 22, but the surgery in fact took place on July 24. A note from a nurse had been altered to the July 22 date. Appellant was at work on the date his daughter was actually hospitalized.

Appellant said the conduct was tied to an alcohol problem which the agency knew about. On agency recommendation, appellant entered an alcohol treatment center. He was placed on a combination of sick leave, annual leave, and leave without pay.

When appellant returned to work on October 14, the agency gave him a notice of proposed removal for the July 22 incident; also considered was appellant's past disciplinary record. He was removed on January 9, 1981.

In his appeal to the Regional Office, appellant claimed that the removal was contrary to the agency's own regulations regarding alcohol-related problems in its employees. Although the presiding official found the charges sustained, and that the agency had met its requirements on treating employees with alcohol-related problems, he found removal too harsh a penalty.

Both appellant and the agency filed petitions for review.

Appellant claimed the presiding official had erred, that the agency action was a prohibited personnel practice, while the agency asserted it had met the correct burden of proof, and that the presiding official was wrong in lessening the penalty.

Granting both petitions, the Board pointed to its holding in *Ruzek v. General Services Administration*, MSPB Order No. SL075209017 (August 20, 1981) that alcoholism is a handicapping condition under the Rehabilitation Act of 1973 as it relates to Federal employment. Thus, the agency must provide reasonable accommodation for the handicap, unless doing that would put undue hardship on its program. In *Ruzek* it said that "an agency must offer the employee rehabilitative assistance and allow him an opportunity to take sick leave for treatment, if necessary, before initiating any disciplinary action for continuing performance or misconduct problems related to his alcoholism."

In this case, the Board found that appellant qualified as handicapped. Although the agency denied knowledge of appellant's problem before the September 4 meeting, the Board noted that at that point, the appellant had informed them that his conduct was alcohol-related. Moreover, the Board found that implicit in the agency's granting three types of leave to appellant was the willingness to give appellant a "reasonable opportunity for rehabilitation." *See Felten v. Department of Labor*, MSPB Order No. CH07528010005 (August 26, 1981).

The Board decided that the agency had arbitrarily withdrawn its reasonable accommodation and thus committed the prohibited personnel practice of handicap discrimination. It reversed the initial decision and ordered the agency to cancel the removal.

JAMES E. MILLER v. DEPARTMENT OF THE NAVY
(Docket No. BN075209065)
May 17, 1982

1.130; 1.369; 1.430; 4.120; 10.122

Appellant was downgraded from a supervisory GS-11 to a non-supervisory GS-9 because of failure to properly charge the absences of two subordinates to leave. He alleged that he was unaware of their absences and had not purposely misreported their hours on the time cards. The presiding official sustained the agency action, finding in one case that while appellant may not have known of the absences, through the exercise of reasonable supervision, he should have known. In the other case, the employee had submitted leave requests, but appellant had not properly charged the leave.

In his petition for review, appellant alleged that the presiding official was biased, said that the testimony of agency witnesses was coerced, argued that he was treated disparately, and alleged he was presenting newly discovered evidence.

Regarding the allegation of bias, the Board said appellant had offered no evidence. He also failed to substantiate his allegation that the testimony given by the other agency employees involved in the case was so "tainted" as to be not believed. As to his allegation that the penalty meted out to him was disproportionate in comparison to that given the other employees, the Board agreed with the presiding official that the difference in penalties was explained by the fact that the appellant was the supervisor.

As alleged new evidence, appellant introduced a memo which stressed employees' responsibility to report leave accurately. He characterized this memo as reflecting a lack of uniformity in reporting leave during the relevant time frame of this appeal. However, the Board said that the supervisor is accountable for monitoring the activities of subordinates. It agreed with the presiding official that appellant should have known of his subordinates' acts and taken action accordingly. The petition for review was denied.

GENE THOMPSON v. SMITHSONIAN INSTITUTION

(Docket No. DC07528010104)
May 11, 1982

1.110; 1.366; 1.390; 1.400; 1.410; 1.420; 4.210

Appellant's agency removed him because of his "inability to perform work commensurate" with his position, and his uncooperative behavior on the job. Appellant asserted racial discrimination. The presiding official sustained the agency's action and dismissed the allegation of racial discrimination, finding that the appellant did not establish a prima facie case.

In his petition for review, appellant contended that the presiding official was wrong in applying the preponderance of evidence standard to only the incidents cited by the agency and not to the overall charges of failure to perform work commensurate with the position and of uncooperative behavior. He argued that even if the presiding official had applied the evidentiary standard to the charges, she did not determine whether removal was the appropriate penalty in this case. The Board granted the petition.

The Board said that when an agency takes an action under Chapter 75, that action will be sustained only if supported by a preponderance of the evidence, and that this applies to the agency's burden in proving the "cause" which led to the disciplinary action. It also applies to factual considerations the agency relied on in selecting a penalty.

In this case, the presiding official found that appellant had on one occasion impeded a project because he was slow, argued with the Electrician Leader, did not follow instructions, and that appellant was removed from a project to prevent delays after his coworkers complained about him. In his petition for review, appellant contended that these incidents did not establish by a preponderance of the evidence that he was unable to perform work commensurate with his position and that he was uncooperative. However, the Board found that a preponderance of the evidence supported both charges.

The Board then discussed the agency-imposed penalty. Using guidelines it laid down in *Douglas v. Veterans Administration*, MSPB Order No. AT075299006 (April 10, 1981), and in *Snipes v. U.S. Postal Service*, MSPB Order No. AT075209206 (May 1, 1981), the Board considered the relevant factors in this case, and decided the presiding official did not err in affirming the removal. It found the penalty of removal reasonable.

ACCEPTABLE LEVEL OF COMPETENCE

WILMA N. DAY v. U.S. DEPARTMENT OF AGRICULTURE (Docket No. AT531D8110300)

May 14, 1982

4.300; 4.310; 9.110; 9.313; 9.320; 9.324

The presiding official reversed the agency's negative acceptable level of competence decision, finding that it was unlawfully based partly on allegations of misconduct. He also found the agency committed harmful error by not providing certain documents to the appellant until she made her oral presentation at the reconsideration hearing.

The agency filed a timely petition for review contending that the presiding official erred in finding harmful error because it had provided the requested material to appellant prior to her oral presentation.

The Board found that failing to provide appellant with documents contained in the reconsideration file until the time of oral presentation violated 5 C.F.R. §531.407(d)(4), and constituted harmful error. The Board further found that the record showed that the appellant did not actually receive the documents in question until the date of the oral presentation. The record also showed that the agency relied extensively on these documents in denying appellant's within-grade increase.

The Board also found that in denying appellant's within-grade increase, the agency relied on allegations of misconduct and unacceptable performance outside the period being considered.

The Board affirmed the initial decision, as modified, and ordered the agency to grant appellant's within-grade increase retroactive to the date of initial eligibility.

WERNER R. MATTERSDORF v. DEPARTMENT OF HEALTH AND HUMAN SERVICES (Docket Nos. DC531D8110227 and DC531D8110430)

May 12, 1982

4.300; 9.110; 9.2141; 9.2144; 9.324; 9.331

The agency petitioned for review of two initial decisions which reversed its denial of a within-grade salary increase to appellant, a GS-13 Systems Analyst. In the first initial decision, the presiding official ruled that the Food and Drug Administration committed harmful error when it did not consider appellant's performance during all of the three-year waiting period—specifically a period of approximately two years when appellant was on detail to the Environmental Protection Agency.

In the second decision, the presiding official also found harmful error. The agency halved appellant's additional 60-day redetermination period by failing to consider his performance while on another detail to EPA for about one month of that period. The Board granted both agency petitions and consolidated them for review.

On May 21, 1980, 52 days before appellant would have been eligible for a within-grade salary increase, his supervisor notified him that his performance was not at an acceptable level of competence and that she would not so certify that it was for purposes of a within-grade increase unless it improved. In a July 11, 1980 memo, appellant was denied his step increase. He appealed the agency's subsequent reconsideration decision. Since he was notified 52 days rather than the required 60 days before the end of the three-year consideration period, he was given 60 more days to improve his work. At the end of that period, appellant's supervisor issued a second negative determination. Subsequently, the agency issued a second reconsideration decision, which appellant appealed.

The Board agreed with the agency's contention that the presiding official unduly restricted the scope of his review of the agency action. In *Parker v. Defense Logistics Agency*, 1 MSPB 489, the Board concluded that the presiding official's review is not limited to the reconsideration record.

Regarding,the first initial decision, the Board noted that because the quality and amount of work appellant performed while on detail were not those required of a GS-13, the EPA could not evaluate his performance according to standards normal for that grade level.

As to the second initial decision, the Board said that the presiding official relied too much on the agency's advance notice and reconsideration decision, and failed to consider other relevant evidence and testimony. Using the substantial evidence standard it laid down in *Parker*, the Board found that the agency used that standard in considering appellant's performance during the entire waiting period, and that it had not committed harmful error.

The Board also found substantial testimonial evidence to show that appellant was not working at an acceptable level of competence at FDA and that the agency, relied heavily on evidence of appellant's unsatisfactory performance during the latter stages of his waiting period. The Board has repeatedly held that such latter stage performance is extremely significant and may be given the greatest emphasis in ALOC determinations.

Although the 60-day redetermination period was shortened because appellant was at EPA for half that time, appellant did not show that it would have made any difference if he had spent full time at his agency. According to testimony, he produced nothing of substance during his four weeks at FDA.

The initial decisions were reversed and the agency's denial of the within-grade increase in salary was sustained.

AIR TRAFFIC CONTROLLERS

JOHN C. KETCHEM v. DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION (Docket No. DA075281F0713)
(May 28, 1982)

1.110; 1.311; 1.600; 4.000000; 4.124; 4.127; 4.130; 4.131; 4.210; 4.320; 6.900; 7.327; 10.112; 10.120; 10.130; 10.131; 10.410

Based on charges that he took part in an illegal strike from August 9 to August 11, 1981 and was AWOL for that period, appellant was removed as an Air Traffic Control Specialist, effective August 30, 1981. The presiding official sustained the removal.

On April 1, 1982, the Board reopened the appeal to consider 10 issues which were common to most of the approximately 10,900 ATC removal appeals before the Board, and requested briefs from interested parties. It received and considered some 32 *amicus* briefs, as well as the agency's brief which was joined by the Office of Personnel Management and the Department of Justice.

In the initial decision, the presiding official took official notice that a strike by thousands of controllers occurred from August 3 through August 11, 1981. He found that circumstantial evidence clearly showed that appellant took part in the strike and was AWOL on the dates charged, and that the agency had proven its charges by a preponderance of the evidence.

In its reopening order, the Board listed two threshold issues: whether an unlawful strike took place in August of 1981, and whether the presiding official properly took official notice of that fact. It noted that the Board's regulations provide that a presiding official "may take official notice of matters of common knowledge or matters that can be verified." Additionally, it noted that the specific regulation does not explicitly provide for the parties to have the chance to contradict whatever has been officially noticed, but that such right is implicit.

The Board found that a strike by the controllers began on August 3, 1981, and that this is a matter of common knowledge which may be officially noticed under the Board's regulation. It said that the presiding official correctly found that an unlawful strike of Air Traffic Controllers started on August 3. It did not, however, support his finding that the strike was in progress through August 11, since the Board concluded whether the strike continued beyond August 6 is subject to substantial dispute. For example, one Federal district court judge has ruled that the strike ended on August 6, a holding similar to that of other Federal District courts. The Federal Government has stated that the strike ended on August 8. Because of this conflicting information, the Board said it could not conclude that it is a matter of common knowledge that the strike was still in progress on August 9 through August 11, and therefore it could not take official notice of such fact. It did take official notice, however, (subject to the right of refutation) that an unlawful strike of controllers started on August 3 and was in progress on August 6. Therefore, where an employee like the appellant is charged with taking part in a strike after August 6, the agency bears the burden of proving that a strike was actually in progress on the date charged, and that the employee could have returned to work on that date.

The Board concluded that an unlawful strike of traffic controllers took place from August 3 through August 6, 1981, and that the presiding official was wrong in taking official notice that the strike continued through August 11. Because the question of whether the strike was in progress during the dates charged by the agency is fundamental to the agency's action against the appellant, as well as against other similarly situated appellants, the Board vacated the initial decision, and remanded the appeal to the Regional Office. It did not consider the remaining issues listed in its reopening order at this stage of the proceedings.

ANNUITIES

LEVERETT EDWARDS v. OFFICE OF PERSONNEL MANAGEMENT (Docket No. DA08318010182)

May 24, 1982

6.100; 10.100; 10.130; 15.120; 15.200; 15.400; 15.410

Appellant petitioned for review of the initial decision which sustained the Office of Personnel Management's reconsideration decision denying his eligibility for either a supplemental annuity benefit or redetermination of his original annuity benefit. Appellant based his claim on service performed from 1970 to 1979 as an arbitrator for the National Mediation Board after his optional retirement from that agency. While OPM called this service intermittent and said it did not provide entitlement to annuity, appellant contended he had served full time with a pre-scheduled tour of duty.

Noting that the statute does not provide for an increased annuity where the annuitant has been reemployed as an intermittent employee, the presiding official found that during the relevant period appellant was an intermittent employee, and concluded that he was not entitled to an increase in his annuity.

In his petition for review appellant claimed that the presiding official erred in relying on OPM's regulations which were not—in light of the controlling statute and the evidence—applicable in his case. He argued that, should his arguments not be accepted, he should get a refund of the $90,667.08 withheld from his pay and deposited to the Retirement Fund. OPM disclaimed jurisdiction over appellant's claim for a refund, saying this was a question of whether appellant received the correct amount of pay which is a matter for the Comptroller General. The Board held that it lacked jurisdiction to consider the question of a refund absent an OPM decision on the matter.

In analyzing appellant's claim that the presiding official erred in finding appellant to be an intermittent employee, the Board found that appellant probably worked about 95 percent of the potential work days each month. It noted that in *Dove v. United States*, 161 Ct. Cl. 768 (1963), the court held, in effect, that a "when actually employed" (WAE) employee who works 90 to 98.4 percent of the available work days over an extended period of time is "in all respects, save the paper record, a full-time, per annum employee."

The Board found that appellant was similarly, in all respects but the paper record, a full-time employee during the period at issue. Therefore, it ruled that he was entitled to annuity benefits. It reversed the initial decision and ordered OPM to let appellant choose either an increased annuity or redetermination of his annuity.

ATTORNEY FEES

In the matter of the Honorable Drew Lewis, Secretary, Department of Transportation, et al* (Docket No. OJ-80-7)
May 17, 1982

3.131; 6.111; 14.110; 14.500; 14.530; 14.540; 14.600; 16.000000; 16.230

Petitioner, an employee of the Federal Aviation Administration, petitioned for attorney fees in connection with an action on his behalf by the Special Counsel. At the Special Counsel's request, the Board had stayed the proposed removal of petitioner who had refused to accept a geographical reassignment. The Special Counsel alleged that the reassignment was motivated by discrimination on the basis of a handicapping condition. The agency and appellant negotiated a settlement through which appellant was neither reassigned nor removed.

The Board said it lacked the authority to award attorney fees in this kind of case. It said that petitioner was not a party to the action through which the Special Counsel obtained a stay, so the provision (5 U.S.C. §7701(g)) which authorizes the Board to order payment of attorney fees to an employee or applicant who is a prevailing party did not apply here.

Further, the Board said it could not authorize payment under the Back Pay Act, 5 U.S.C. §5596(b)(1)(A)(ii). Payment can be ordered only if an "appropriate authority" has determined that the petitioner has been subjected to an unjustified personnel action which resulted in loss of pay. Although the Board is an "appropriate authority," it had not made the required determination. The employing agency, not the Board, corrected the challenged personnel action in this case. The Board simply provided interim relief. The issuance of such a stay is not a final decision on the merits of the case. The Board denied the motion for attorney fees.

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*Case was formerly captioned *In the matter of Neil R. Goldschmidt, et al.*

DISABILITY RETIREMENT

MARY JANE DALEY v. OFFICE OF PERSONNEL MANAGEMENT and DEPARTMENT OF HEALTH AND HUMAN SERVICES (CSA 2 241 438) (Docket No. PH831L09005)
May 25, 1982

1.111; 6.120; 6.400; 15.130; 15.132; 15.13212; 15.133

The Office of Personnel Management originally granted the disability retirement application filed by appellant's agency. Then, OPM affirmed its grant, and appellant appealed that reconsideration decision to the Board's Philadelphia Office. The presiding office sustained OPM's decision to grant disability retirement, whereupon appellant petitioned the Board for review, saying that she had new evidence in support of her claim that she was not totally disabled for service in the position she last occupied.

The Board said that while appellant's evidence (a letter from a doctor saying she was capable of employment, but making no statement on appellant's mental condition) was new, it was not material to her appeal. However, the Board reopened the case on its own motion, since it presented issues regarding the deciding roles and burdens of various parties, such as the employee, the agency and OPM, in appeals from agency-initiated disability retirement applications.

The Board noted that the presiding official had put the burden of proof alternately on the appellant and on OPM, but that in *Chavez v. Office of Personnel Management*, MSPB Order No. DA831L09003, (May 28, 1981), it had held that the employee has the burden to prove disability on a voluntarily-initiated application. In *Chavez*, the Board noted that Congress' intent was to place the burden on the party initiating the action. Therefore, it considered the question of who initiated the action in this case.

Where an agency starts the action, the employee make take part in such a process, and must be kept informed, but the agency may carry it out without the employee's involvement. The employee may ask for a reconsideration decision, once OPM has issued its decision, and thereby becomes another party to the action already underway.

In this case, the Board said that the presiding official should have viewed the employing agency as the initiator of the action, and given it the burdens associated with that role. The Board affirmed the presiding official's factual findings, and found that the employing agency had met its burden to prove the appellant was totally disabled. The initial decision was affirmed as modified by this Opinion and Order.

OTHER MAY ISSUANCES

PETITIONS FOR REVIEW DENIED

ALFORD, Rayford, Jr. v. Department of the Navy (AT752S8110365)
ANDERSON, Florence J. v. Veterans Administration (DE07528110115)
BANDY, Janet A. v. U.S. Department of Housing and Urban Development (DC3448210032)
BARRERA, Lesbia v. Department of the Army (DC315H8110626)
BERNABE, Tomas P. v. Office of Personnel Management (SF08318110821)
BLANCHARD, William H. v. Department of the Navy (PH07528010116ADD)
BOWERS, Oscar L. v. United States Postal Service (AT075209258)
BRITTAIN, Clay V. v. Department of the Army (PH035109034)
BUNCE, Howard v. General Services Administration (SF07528111888)
CALDWELL, Eric v. Department of Justice (AT752S8110963)
CARTER, Harry C. v. Department of the Army (AT07528110203)
CLOWERS, Debra v. U.S. Postal Service (CH07528210063)
DAMA, Joseph D. v. Department of Health and Human Services (NY531D8110028)
DARRACH, John B. v. Department of the Army (PH07528110088)
DAVIS, Sandra H. v. United States Department of Agriculture (AT03518010188)
DEMCHAK, John M. v. Department of the Interior (DE03518110310)
DIGGS, Calvin H. v. Office of Personnel Management (DC831L8110635)
DONALD, Wayne S. v. Department of Education (AT34438110637)
DONOVAN, William v. Federal Aviation Administration (AT075282F0089)
DOWDEN, Ellen G. v. Department of Agriculture (SE315H8210011)
DUVLEA, Marian R. v. U.S. Department of Transportation, Federal Aviation Administration (CH07528110711)
ECHOLS, Earvin v. Defense Logistics Agency (AT07528110263)
EDWARDS, Daniel L. v. Office of Personnel Management (CH831L8110611)
EPPERSON, Gordon L. v. Department of the Treasury (CH07528010125)
FELTER, Juanita H. v. Department of Commerce (AT03518110083)
FERGUSON, Joyce v. Veterans Administration (NY315H8110304)
FINLEY, Barbara v. Department of Transportation (SF07528111906)
FRAILEY, Frank W. v. Department of the Army (DE07528110132)
GREEN, Simone M. v. Department of the Army (SE07528110002)
GREUBEL, Frank v. Veterans Administration (SL07528110037)
GUHL, William F. v. Defense Logistics Agency (CH34438110418)
HATCHER, Dorothy A. v. Department of Health and Human Services, Social Security Administration (PH07528110340)
HINGSBERGEN, Thomas v. Department of the Navy (SF300A8010542)
HOBBS, Thomas v. Department of the Air Force (DA07528110104)
HOBSON, William L. v. U.S. Postal Service (PH07528210075)
HOLZRICHTER, Audrie L. v. Department of the Air Force (DE03308110049)
JACKSON, Mary E. v. Department of Army (AT07528010353)
JOHNSON, Evelyn V. v. Department of the Air Force (SF07528110563)
JONES, Burlene v. U.S. Postal Service (SF03538110570)
KENDRICK, Elaine C. v. Veterans Administration (DC07528010146)
KENNEDY, Sanford v. Veterans Administration (PH03518110319)
KETCHEM, John C. v. Department of Transportation (DA075281F0713)
KILLINGSWORTH, George F. v. Department of Health and Human Services (SF03518110645)
KLEIN, Hubert H. v. Office of Personnel Management (DA831L8010252)
LANDRY, Paul H. v. Office of Personnel Management (BN08318010042)
LIPPINCOTT, Linda v. U.S. Defense Logistics Agency (CH07528010028)
LOGUE, John P. v. U.S. Postal Service (PH07528010208)
LUCAS, Stella v. Department of the Army (SF531D8110640)
MADNICK, Allan W. v. Department of the Navy (NY07528110180)
MASON, John A. v. National Aeronautics and Space Administration (DA34438110275)
MCDANIEL, Trudy L. v. Department of the Interior (AT03518110627)
MCKINNEY, Bryant D., Jr. v. Tennessee Valley Authority (AT34438110672)

MILLS, Barbara J. v. Department of the Navy (PH07528110430)
MOBLEY, Carolyn v. Department of Health and Human Services (NY07528010102)
MOORE, Kenneth v. Department of the Army (SF07528110391)
NASH, Gwendolyn T. v. Department of Health and Human Services (DE300A8110005)
NASH, Merry L. v. Department of the Treasury (NY07528110277)
NELSON, Ailene v. Department of Health and Human Services (SL07528110193)
NESSON, Janice W. v. Department of the Treasury (PH04328110123)
OLIVER, James v. United States Postal Service (DA07528110242)
PATTERSON, E. Arthur v. Department of the Interior (SE035199001)
PENN, Frances v. Department of Justice (NY07528110145)
PETERS, George W. v. Department of Navy (DC03518010077)
PINTO, Robert G. v. Department of Labor (DE07528010140)
PITTMAN, Herman D. v. Office of Personnel Management (DC831L8110526)
PLOG, Harold G. v. Department of the Treasury (NY07528210115)
POLK, Janeice V. v. Internal Revenue Service (DA531D8110084)
QUINN, James K. v. Office of Personnel Management (DA831L8110115)
RIAS, Ulysses v. Veterans Administration (PH07528110044)
RISHER, William R. v. Department of the Army (DC03518110236)
RODRIGUEZ, Donna M. v. Department of the Army (SE07528110006M)
RYAN, Joyce J. v. Veterans Administration (SF07528111051)
SALISBURY, L. Leon, Jr. v. Department of Justice (DC07528110577)
SANDERS, Eddie G. v. Veterans Administration (DA07528110056)
SKAARER, Timothy L. v. Department of the Air Force (DA300A8010244)
SMITH, Nancy S. v. Office of Personnel Management (DA831L8110587)
SPRINGER, Matilde T. v. Department of the Army (DC07528110209)
STANKIS, Glenn A. v. Environmental Protection Agency (DA531D8090007) and (DA531D8090013)
STOCKTON, Terry v. Department of the Navy (SF07528110536)
TALSTROM, Frederick v. Department of the Army (DC315H8110821)
THOMAS, Drewnell v. Department of Commerce (AT03518110083)
THOMPSON, Patrick J. v. United States Coast Guard (NY07528110166)
TOJINO, Ricardo v. Department of the Army (SF07528110562)
TURANSKY, Lenore F. v. Veterans Administration (PH07528110175)
WAFFORD, James E. v. Department of the Air Force (SF07528110949)
WILLIAMS, McKinley v. Department of the Army (DA07528110628)
WOODWARD, Curtis R., Jr. v. Tennessee Valley Authority (AT07528110443)

PETITIONS FOR REVIEW DISMISSED

NUNEZ, Rafael v. U.S. Postal Service (CH07528110474)
PARRIS, Homer v. Office of Personnel Management (DA831L8110411)

AGENCY PETITION FOR REVIEW GRANTED

CARROLL, Donna v. Department of Health and Human Services (AT531D8090007)

INITIAL DECISIONS REVERSED

CLARK, Haywood, Jr. v. Government Printing Office (DC07528010293)
COLYOTT, Woodrow R. v. Department of Agriculture (SE07528110067)
CURRAN, James H. v. Department of the Treasury (SE07528110070)
EVANS, Dennis v. Department of the Navy (SF07528010001)
GREEN, Vincent v. Department of the Navy (PH07528110039)
JACKSON, Clive M. v. Defense Logistics Agency (SF07528010154)
LLOYD, Richard L. v. Department of the Navy (SE531D8110094)
NASH, Edna M. v. Office of Personnel Management (AT831L8110342)
NELSON, Morris J. v. United States Postal Service (SF075209049)
ROBINSON, Robert J. v. Office of Personnel Management (AT831L8010193)
WOODBY, Ethel M. v. Department of Justice, U.S. Marshals Service (PH07528010142)

INITIAL DECISIONS AFFIRMED OR AFFIRMED AS MODIFIED

APPLEMAN, Orrin A. v. Office of Personnel Management (DA831L8110213)
BEACHBOARD, John v. Department of the Army (SF300A8110639)

BECHTEL, Dwight E. v. Office of Personnel Management (AT07528010222)
BURTON, George v. U.S. Postal Service (CH07527990022)
BYE, Karen E. v. Office of Personnel Management and Internal Revenue Service (SF300A8110575)
D'AGOSTINO, Norma M. v. Office of Personnel Management (PH831L8110196)
FREGOSI, Edward v. Office of Personnel Management (NY08318110161)
GALLAGHER, Neil L. v. Department of Labor (PH07528110284)
GARNER, Edith F. v. Department of the Army (AT07528010356)
HOLLAND, Dixie L. v. U.S. Department of Agriculture (SF531D8110545)
JACKSON, Franklin v. United States Department of Housing and Urban Development (DE531D8110058)
KHAN, Ruth v. Office of Personnel Management and Internal Revenue Service (SF300A8110578)
KING, Nancy S. v. Department of Health and Human Services (SF07528010349)
LANGSTER, Lee V. v. Department of Health and Human Services (CH300A8110131)
LE FLORE, Donald A. v. U.S. Postal Service (SF07528110404)
LOWELL, Linda B. v. Department of the Air Force (DA07528010300)
MURPHY, William v. Department of the Air Force (DA07528110147)
NAGEL, James B. v. Department of Health and Human Services (DC07528010386)
PFEIL, Church B. v. Office of Personnel Management (NY831L8110111)
PRINCE, Alfred v. Department of Transportation (DC03518110224)
RENEHAN, John L. v. Department of the Army (PH531D09011)
ROBERTS, Amy H. v. Department of the Army (AT07528010354)
SEIBEL, Kim A. v. Department of the Air Force (AT07528010033)
WILLIAMS, ERICK N. v. Veterans Administration (PH07528090045)

CASES REMANDED TO REGIONAL OFFICES

CAPOZZELLA, Vincent J. v. Federal Bureau of Investigation (PH07528110103)
GAYDEN, Marlene C. v. Department of Health and Human Services (CH03518210215)
GLOVER, Franklin D. v. U.S. Government Printing Office (DC07528110390)
GONZALES, Joe A. v. U.S. Postal Service (DA07528110361)
JOHNSON, Billy L. v. Department of the Army (DC03518010275)
MUTTIE, Joseph D. v. Department of the Navy (NY07528110138)
QUAREZO, Cristobal C. v. Office of Personnel Management (SF08318111217)
STEVENS, Ann L. v. Office of Personnel Management (CH831L8110457)

INITIAL DECISIONS VACATED AND APPEALS DISMISSED

AHMED, Abul A. M. v. Environmental Protection Agency (DC315H8110448)
BATCHELDER, Merton J. v. Department of the Army (DC531D8010167)
HALL, Marjorie v. Office of Personnel Management (DA300A09002)
RINDFLEISH, Lisa A. v. Office of Personnel Management (BN300A8110120)

BOARD REVERSED REMOVAL/SUSPENSION ACTION AND OTHERWISE AFFIRMED INITIAL DECISION

BARNER, Ulysses R. v. U.S. Postal Service (DA07528090154)
DAVIS, Willie L., Jr. v. Tennessee Valley Authority (AT07528110206)
ORIAS, Eugene B. v. Department of the Navy (SF07528010329)
THOMAS, Valerie v. Department of Health and Human Services (PH07528010236)

CASES REOPENED BY THE BOARD

HARRIS, Elizabeth v. Office of Personnel Management (PH831L8010255)
LENOX, Margaret, Appellant v. Office of Personnel Management, Respondent (DA08318210396)
LENOX, Merle E., Appellant and Margaret Lenox, Intervenor, v. Office of Personnel Management, Respondent (DA08318210253)

INITIAL DECISION REVERSED, APPEAL DISMISSED, MOTION TO CONSOLIDATE DENIED

WOOLARD, Doris E. v. Department of the Army (PH075209169)

PETITIONER'S REQUEST FOR A STAY OF BOARD'S FINAL ORDER DENIED

DUCKETT, Jessie E. v. Tennessee Valley Authority (AT07528010325)
YARDLEY, John S. v. Tennessee Valley Authority (AT0728010325)

REQUEST FOR RECONSIDERATION OF PREVIOUS ORDER DENIED

KETCHEM, John C. v. Federal Aviation Administration (DA075281F0713)

RESPONDENT ORDERED IMMEDIATELY SUSPENDED WITHOUT PAY

SPECIAL COUNSEL v. Johnny A. Tacker (HQ120600027)

OFFICE OF PERSONNEL MANAGEMENT ORDERED TO SUBMIT BRIEF

LOSURE, Jean Hoover v. Interstate Commerce Commission (DC035199008ADD)

AGENCY MOTION TO SEAL DOCUMENTS GRANTED

WILLIAMS, James W., Jr. v. General Services Administration (DE07538110040)

CASES UNDER THE SPECIAL COUNSEL

SPECIAL COUNSEL v. Department of Labor (HQ12068010001)

SPECIAL COUNSEL v. Housing and Urban Development (HQ12088210004)

CASES ASSIGNED TO ADMINISTRATIVE LAW JUDGES

In the Matter of: Stanley M. Balahan, Administrative Law Judge, Social Security Administration, Department of Health and Human Services (HQ75218210014)

In the Matter of: Robert W. Goodman, Administrative Law Judge, Social Security Administration, Department of Health and Human Services (HQ75218210015)

In the Matter of: Irving Shore, Administrative Law Judge, Social Security Administration, Department of Health and Human Services (HQ75218210013)

SPECIAL COUNSEL v. James C. Cummings, Jr. (HQ12068210019)

SPECIAL COUNSEL v. Nathaniel Sims (HQ12068210011)

SPECIAL COUNSEL v. Susan M. Suso (HQ12068210017)

SPECIAL COUNSEL v. Dale W. Yoho and Lawrence County Pennsylvania (HQ12068210016)

REQUESTS FOR EXTENSIONS OF TIME DENIED

CARTER, William J. v. Department of the Interior (DA03518210134)

HALL, Bert E., Jr. v. General Services Administration (PH07528210099)

HOLMES, Gregg E. v. Department of Transportation, Federal Aviation Administration (DA075282F0024)

KERR, John H. v. National Endowment for the Arts (BN07528010004COMP.)

KETCHEM, John C. v. Department of Transportation, Federal Aviation Administration (DA075281F0713)

MOORE, William W. v. General Services Administration (PH07528210059)

REQUESTS FOR EXTENSIONS OF TIME GRANTED

ADKINS, Alfred J. v. Federal Communications Commission (DC07528210366)

APODACA, Allen T. v. Department of Education (SE03518210060)

BAIN, Kenneth, Jr. v. Department of Justice (PH07528210105)

BAJWA, Rajinder S. v. Department of Agriculture (DC531D8210383)

COWLES, Floyd R. v. Office of Personnel Management (DE08318210047)

IRELAND, Michael N. v. Department of Health and Human Services, Social Security Administration (PH07528210173)

JONES, Israel v. U.S. Postal Service (NY07528210174)

KERR, John H. v. National Endowment for the Arts (BN07528010005-Comp.)

LAWS, Louise v. Department of Defense (CH07528210098)

MARBRAY, James N. v. Department of the Navy (DC07528210478)

MATTHEWS, Frank v. Office of Personnel Management (AT07528210378)

MOSKI, Douglas Wayne v. Department of the Air Force (AT315H8210501)

NUOVO, Fedela v. Department of the Interior (SF07528111903)

PADILLA, Sandy v. Equal Employment Opportunity Commission (SF07528110845)

PERDUE, Selmar, Jr. v. Veterans Administration (CH07528210126)

ROBERTS, Joseph P. v. Veterans Administration (SF07528111065)

RYBA, Vincent J. v. U.S. Department of the Navy (DC03518210219)

SCHULDER, Daniel J. v. Department of Commerce (DC03518210396)

SNYDER, Joseph v. Department of the Army (NY07528210107)

STECHLER, Bernard v. Department of Energy (NY03518210062)

STOCKMAN, Rita M. v. Department of the Army (AT07528210341)

TRAVAGLINI, Carla B. v. Department of Education (DC07528110641)

WARD, Lacy B. v. U.S. Consumer Product Safety Commission (PH07528010360)

WEBB, Renea A. v. U.S. Consumer Product Safety Commission (PH07528010307)

WHITE, Bernard v. U.S. Postal Service (NY07528210187)

ERRATA

ADAMS, Alfred J. v. Federal Communications Commission (DC07528210306)

HELLMAN, Donald L. v. Office of Personnel Management (AT300A7990002)

MOORE, William W. v. General Services Administration (PH07528210081)

JUNE CASES

ADVERSE ACTIONS

DIANE T. KOMORA v. VETERANS ADMINISTRATION (Docket No. CH07528110507)
June 16, 1982

1.110; 1.311; 8.420; 8.423; 10.1322; 15.131

Appellant was removed based on the Office of Personnel Management's (OPM) denial of her application for disability retirement and her absence from duty in a leave without pay (LWOP) status for approximately four years.

The presiding official reversed the agency's action in the initial decision. The presiding official found that OPM's failure to grant appellant's disability retirement application did not constitute a valid basis for removing her. The presiding official also found that an appellant's extended absence from work in an approved leave status was insufficient grounds for an adverse action in the absence of proof that the agency had advised appellant to return to work by a specified date or face removal for continued absence. In addition, the presiding official noted that the agency failed to produce evidence that it needed to fill the position with a productive employee.

In its petition for review the agency argued that it had fully complied with OPM's regulations at 5 C.F.R. §353.307. The agency also argued that the initial decision would require an agency to carry an employee in a LWOP status indefinitely. The Board found the agency's arguments to be without merit. Part 353 of 5 C.F.R. involves an employee's right to restoration to his former position and was inapplicable to this case. The agency's reliance on section 353.307 was misplaced in that the OPM regulation provides priority consideration for restoration to employees who are separated because of a compensable injury. The record in this case showed that appellant was receiving compensation for an injury she had sustained, but that her separation was not due to her injury. The record, in fact, showed that appellant was in an approved leave status during the time.

The Board has held previously that when granting an employee's request for LWOP, an agency gives its official approval to the absences and, therefore, an employee's instances of LWOP should not be the basis for an adverse action. The Board also held that although it would be inequitable to allow an agency to take an action against an employee solely on the basis of his using approved leave, removal for prolonged absence has been considered just cause for removal. The Board, however, agreed with the presiding official that before removing appellant, the agency should have advised her to report to work or face dismissal. The Board stated that the agency was obligated to show that the appellant's position needed to be filled by an employee on a regular basis.

The Board found that the agency did not show an adequate basis for removing appellant and that the presiding official's reversal of the agency action was proper.

The Board, therefore, denied the agency's petition for review and ordered the agency to cancel the removal.

HAROLD W. MARTIN v. DEPARTMENT OF TREASURY, U.S. CUSTOMS SERVICE (Docket No. AT075209044)
BRUCE BROWN and DANIEL CHAREST v. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE (Docket No. SF075209127)
DIRK A. DICK and JEFFREY OTHERSON v. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE (Docket No. SF075209119)
June 1, 1982

1.120; 1.330; 1.3311; 1.367; 1.368; 4.126; 10.114; 10.12111

Each of the above-listed appellants was indefinitely suspended. 5 U.S.C. §7501(2) defines a suspension as the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay. The Board found that the most essential criterion of an action, if it is to meet the definition, is that it be temporary. Accordingly, while the exact duration of an indefinite suspension may not be ascertainable, such an action must have a condition subsequent such as the completion of a trial or investigation which will terminate the suspension. The Board noted that although the time duration of the action may not be determinable, an indefinite suspension continuing beyond the given point of termination would be improper. Such an action, imposed with no ascertainable end in sight, would not be sustainable as a suspension because of failure to meet the criterion of temporariness. The indefinite suspensions were all taken pursuant to the shortened notice period provided for by 5 U.S.C. §7513(b)(1). The Board found that the cases presented similar issues and therefore consolidated them for adjudication.

The Department of Justice moved to have appellant Dick's appeal dismissed since Dick submitted his resignation retroactively effective on the date of his suspension. Accordingly, since the record reflected that appellant Dick no longer had an appealable action before the Board, the Board dismissed his appeal.

Appellant Martin was indefinitely suspended on charges of unauthorized interception of oral communications, conduct prejudicial to the best interest of the service, and interfering with the rights of another. The record indicated that the agency had received a preliminary investigative report and that further investigation was ongoing. The Board found the continuing investigation, the actual evidence obtained, and the fact that the matter was referred to the U.S. Attorney for investigation and possible action provided sufficient basis for reasonable cause. The Board also found that while an investigation should not form the basis for an indefinite suspension, it may provide such a basis where it is accompanied by evidence which is sufficient to afford reasonable cause to believe. Further, the Board found that the ongoing investigative process and referral to the U.S. Attorney supported the temporary nature of the suspension. Finally, the Board found that the suspension action was reasonable and promoted the efficiency of the service. Accordingly, the indefinite suspension action taken against Martin was sustained.

Otherson, Brown and Charest were indefinitely suspended from the positions of border patrol agents when they were indicted for conspiring to deprive and actually depriving persons of their civil rights. The Board agreed with the presiding official that the suspensions were based upon reasonable cause to believe that crimes had been committed for which sentences of imprisonment could be imposed, and that the charged offenses bore a direct relationship to appellant's duties. The Board also agreed that since the appellants had been indicted and criminal proceedings were ongoing, the suspensions contained clear conditions subsequent and could be considered temporary. The issue was whether the agency had proven the reasonable necessity for the suspensions since, in view of the evidence, the appellants were not suspended but reassigned pending resolution of the charges against them.

Appellants were charged with conspiracy and with committing several incidents of planned, brutal behavior toward aliens. Cases of other employees who were reassigned due to similar circumstances did not contain charges of such behavior as was allegedly engaged in by these appellants. In view of the nature and seriousness of the charges and the direct relationship between the charges and appellant's positions and the agency's mission, the Board found that the indefinite suspensions were reasonably necessary. Accordingly, the actions taken against Otherson, Brown and Charest were sustained by the Board.

In sustaining the indefinite suspensions in these cases, the Board did so only for the duration of the investigations and until the criminal proceedings were resolved. The board found that continuance of the suspensions beyond such time was unauthorized.

In examining the record as to the current status of the cases, the Board found that Charest's record indicated that he was acquitted and that his suspension was thereupon terminated; that Otherson was convicted of conspiracy to deprive civil rights and deprivation of civil rights, fined and sentenced, and that there was no information as to what action, if any, was taken by the agency with respect to Otherson following his conviction; that the records on Brown and Martin were lacking current information regarding their proceedings.

Accordingly, the initial decisions in the cases of Martin, Brown and Charest were affirmed as modified. The initial decision in the case of Dick was vacated and the appeal was dismissed. The initial decision in the case of Otherson was reversed.

ALAN MAXFIELD v. DEPARTMENT OF TRANSPORTATION (Docket No. DE07528110038)
June 2, 1982

1.110; 1.345; 4.120; 4.125; 10.130

Appellant filed a petition for review of an initial decision sustaining his removal for "intentionally disabling FAA electronic equipment used to control air traffic." Appellant contended that the presiding official's conclusion that the agency action was supported by a preponderance of the evidence was not supported by the record.

The agency contended that someone pressed a shutoff button on the terminal system causing a stop light to go on and causing the terminal system used to control air traffic to fail. The agency contended that the appellant was observed a short time after—at a location which would have given him enough time to shut down the system by pressing the stop button on the control panel—descending the stairs and departing the control tower. Appellant's supervisor and a truck technician claimed to have passed appellant travelling in the opposite direction from which they were going to the control tower. Two other workers at the tower claimed they observed appellant immediately after the time reported for the shutdown, leaving via a different route, which appellant also claimed to have taken.

In the initial decision, the presiding official credited the testimony of the supervisor and the technician because he found that they were closer to appellant at the time they saw him and could discern his physical features, while two other workers, who were on the sixth floor of the tower, could only identify appellant's motorcycle. Moreover, the presiding official concluded that the appellant was the only one with the opportunity to cause the outage; that appellant's testimony was self-serving; and that no evidence was introduced which would show that either the supervisor or the truck technician had a dislike for appellant or would benefit from his removal.

The Board found that contrary to the presiding official's findings, neither the supervisor nor the technician were able to discern appellant's physical features and thereby identify him. Moreover, the Board rejected the notion that appellant's testimony deserved less weight because it was self-serving. The Board noted that most testimony is self-serving to some degree and found appellant's testimony to be of significant value because it was corroborated by two other workers who did not work with appellant. The Board was not persuaded by the presiding official's reasoning that no evidence was presented that either the supervisor or the truck technician disliked appellant or would benefit from his removal. The Board held that the same observation could be made for crediting the testimony of the two workers who did not even work with appellant. Further, the Board found that the record failed to support the presiding official's finding that appellant was the only person who had the opportunity to cause the outage.

The Board has held previously that it is not bound by the presiding official's findings of fact in reviewing an initial decision, but may substitute its own factual determinations giving the presiding official's findings only so much weight as may be warranted by the record and by the strength of the presiding official's reasoning. In view of the conflicting evidence regarding the route appellant took after he left the tower; the paltry evidence that because appellant did not like the updated system he may have had a motive to cause the outage; and the undisputed showing that other persons had access to the system and therefore had equal opportunity to shut down the system, the Board felt that it could not agree with the presiding official's conclusion that the agency proved by a preponderance of the evidence that appellant deliberately caused the outage by pressing the stop button on the terminal system.

Accordingly, the initial decision and the agency action were reversed and the agency ordered to cancel the removal.

GEORGE H. WILSON v. U.S. DEPARTMENT OF THE NAVY (Docket No. PH07528110091)
June 3, 1982

1.110; 1.310; 1.371; 1.400; 1.410; 1.420; 3.130; 3.1313; 3.1321; 4.125; 4.250; 6.330; 14.700

The agency petitioned the Board for review of an initial decision reversing its action removing appellant based on a charge that appellant was absent without (AWOL) for eight hours. The agency had also considered two prior offenses in determining the removal action.

The presiding official found the charge to be proven by a preponderance of the evidence, but held that appellant's removal was not for such cause as would promote the efficiency of the service under 5 C.F.R. §7513(a), and reversed the removal action. The Board reviewed the agency's arguments, and found that the agency merely disagreed with the presiding official's findings of fact, credibility determinations and interpretation of evidence. The agency did not establish a misapplication of the standards of proof, nor did the agency establish that the initial decision was based on an erroneous interpretation of statute or regulation. 5 C.F.R. §1201.115(b). The Board felt that the petition implicitly raised questions concerning the accommodation that was afforded appellant for his alcoholism and efforts at rehabilitation and the appropriateness of the penalty. In the Board's view, these issues were not adequately discussed in the initial decision.

In *Ruzek v. General Services Administration*, MSPB Order No. SL075209017 (August 20, 1981), The Board determined that alcoholism constitutes a handicapping condition under the Rehabilitation Act of 1973 as it relates to Federal employees. The Board further held that an agency must offer the employee rehabilitative assistance and allow him an opportunity to take sick leave for treatment, if necessary, before initiating any disciplinary action for continuing performance or misconduct problems related to his alcoholism. *Id.* at 8.

In this case, the record indicated that the agency recognized appellant's problems, counseled the appellant and offered him the opportunity to participate in a rehabilitation program. Appellant rejected the agency's offer. The appellant failed to meet his burden of persuasion to establish a case raising an inference of handicap discrimination.

The Board previously determined that it does have the authority to modify or reduce an agency-imposed penalty, and, where the agency's decision to impose a penalty involves factual considerations, the preponderance of the evidence applies. The Board also determined that the scope of its review of an agency-imposed penalty is to insure that the agency conscientiously considered the relevant factors and struck a responsible balance within the limits of reasonableness.

The presiding official concluded that the penalty of removal for three separate eight hour absences over a period of more than 13 months was excessive and that appellant's removal would not promote the efficiency of the service. Although the agency's Guideline Schedule of Penalties provides a range of a five-day suspension to removal for a third offense of unauthorized absence, the Board concluded that the penalty of removal was unduly harsh and unreasonable, and that an alternate sanction would be more appropriate in this case.

Accordingly, the Board found a 30-day suspension to be the maximum reasonable penalty.

OTHER JUNE ISSUANCES

PETITIONS FOR REVIEW DENIED

ACKERMAN, Donald L. v. Office of Personnel Management (DA08318110520)
ADAMS, John R. v. U.S. Postal Service (BN07528010002)
AGRO, David T. v. Department of Energy (DC531D8110141)
ALMOND, Pat v. U.S. Postal Service (DA07528010169ADD)
ARMORER, Audra V. v. Department of Health and Human Services, Social Security Administration (NY07528110058)
BACON, Edna M. v. Veterans Administration (SF07528110423)
BAKER, Charles R. v. Department of the Army (DE07528110158)
BAKER, Michael Scott v. U.S. Postal Service (SE531D8110213)
BARNETT, Lucille C. v. Veterans Administration (AT07528010324)
BARRICELLA, Frances L. v. Veterans Administration (PH07528110220)
BARTLETT, Raymond D. v. United States Postal Service (NY07528110047)
BEELER, Richard E. v. Department of Agriculture (SF07528111048)
BETTS, Anne H. v. Department of the Army (DC035109086)
BROWN, James O. v. Department of Labor (NY531D8110282)
BRYANT, Chester v. General Services Administration (SF07528010403)
BULLITT, Ernest, Jr. v. United States Postal Service (CH07528110111)
BURNETTE, Clarence G. v. U.S. Postal Service (AT07528110368)
CAPONETTO, Carolyn R. v. Office of Personnel Management (SF831L8110671)
CASTLE, James E. v. U.S. Department of Agriculture, U.S. Forest Service (SF07528110569)
CAVE, Patricia A. v. U.S. Postal Service (NY03538110250)
COMPTON, Robert v. Department of Energy (SL035109001ADD)
COOK, Donaldson v. Office of Personnel Management (DA08318110578)
COOPER, Lee W. v. U.S. Marine Corps (SF07528010344)
COX, Peggy J. v. U.S. International Trade Commission (DC07528090042)
DAVIS, Paul V. v. Department of the Army (DC07528110456)
FELLMAN, Mary K. v. Veterans Administration (SL07528110045)
FLORES, Lisa A. v. Farmers Home Administration (SL315H8110192)
GELLERMAN, James R. v. Veterans Administration (CH07528110093)
GLOSTER, Ruth O. v. General Services Administration (DC07528110606)
HALL, Kenneth L. v. Department of the Air Force and Office of Personnel Management (DE300A8110096)
HAMPTON, Haston C. v. Veterans Administration (PH07528110541)
HEADDS, Aaron v. U.S. Postal Service (AT07528110523)
HERMAN, Donald F. v. Department of the Air Force (SF07528111079)
HERNANDEZ, Lewis T. v. United States Postal Service (SF07528110634)
ISZA, William V. v. Department of the Army (SF07528110055)
IYOTTE, Patrick N. v. United States Department of the Interior (DE07528110042)
JONES, Lorenzo v. Department of Education (DC315H8110758)
KELLEY, Eugene v. Department of the Air Force (SF07528110969)
KERR, Ethel v. Department of Health and Human Services (SF531D8110132)
KREPO, Donald E. v. U.S. Department of Energy (DC03518210251)
KUWADA, Darryl v. Department of the Navy (SF07528110615)
LATTANZI, Celeste M. v. Department of Health and Human Services (BN07528110086)
LEDDY, John J. v. Office of Personnel Management (NY07528110105)
LEMOND, Jack v. U.S. Postal Service (DA03538110481)
LLOYD, Gordon C. v. U.S. Department of Agriculture, U.S. Forest Service (SF07528110691)
LONG, Whitfield v. Veterans Administration (DA07528110310)
LOPEZ, Juanita S. v. Veterans Administration (DA07528110066)
LORENZ, Paul v. Department of Interior (DE03518110173)
LITTLEFIELD, Clyde R. v. Department of the Air Force (DC07528110299)
MARION, Gerald J. H. v. U.S. Department of the Navy (DC07528010304)
MARLOWE, Don W. v. Department of the Navy (SE07528110085)
MARTINEZ, Wilfred P. v. Department of the Air Force (HQ71218110053)
MCCALLISTER, Carolyn v. Government of the District of Columbia (DC34438010091)

MCQUERTER, Zeldar v. Department of the Army (SE07528110016)

MIDDLETON, Robert E., Sr. v. Department of the Army (AT07528010358)

MILLER, Green, Jr. v. Department of Transportation, Urban Mass Transportation Administration (DC03518210766)

MITCHELL, Robert L. v. U.S. Veterans Administration (SL07528110005)

MONDAY, Al v. Department of Health and Human Services (NY315H8110328)

MORGAN, Jerry L. v. Department of the Army (AT07528110184)

MORRIS, Charles R. v. Department of the Navy (DC07528110372)

MURPHY, Walter F., Jr. v. Department of the Air Force (DE34438110151)

MYCKA, Ronald D. v. Office of Personnel Management (DC831L8090009)

NEWTON, Kenneth E. v. Department of the Navy (SF315H8110373)

NOWAK, Jean M. v. Small Business Administration (DC03518010075)

OCCORSO, Angelo v. U.S. Postal Service (PH07528110238)

O'NEIL, Loraine J. v. Department of Transportation, Federal Aviation Administration (BN07528110063)

PARSONS, Elce v. Department of the Air Force (DA07528110393)

PATTERSON, Dale S. v. Veterans Administration (AT07528110370)

PENNINGTON, J. C. v. Department of Health and Human Services (AT07528010094)

PENTACOST, Edwin D. v. Department of Agriculture (DE07528110239)

POWANDA, John N. v. Department of Defense (DC315H8110777)

POWELL, William N. v. Department of the Air Force (CH34438210118)

POWERS, Louise D. v. Department of the Army (DC531D8110883)

PRESIDENT, Marvin E. v. Department of Justice (DA07528110026)

REETER, Robert W. v. Department of the Navy (AT34438110437)

RHOADS, George v. Department of the Treasury (PH07528110217)

RICHEY, Clarence v. Department of Health and Human Services (CH07527990060)

RIVAS, Andrew v. Department of the Navy (SF315H8111897)

ROSSER, Thomas v. Department of the Air Force (AT03518110585)

SHAW, Robert J. v. General Services Administration (PH07528110187)

SMALLS, Leonard H. v. Department of the Navy (AT07528110160)

SMYTH, Donald v. Department of the Treasury (CH075209204)

STANKIS, Glenn A. v. Environmental Protection Agency (DA531D8110205) and (DA531D8110501)

SWINDELL, Willie J. v. Veterans Administration (NY07528110114)

TACCONE, Grace v. United States Postal Service (SF07528110417)

TRAVIS, William A., Sr. v. Office of Personnel Management (DE831L8110102)

TURNER, Michael J. v. Department of Housing and Urban Development (DE531D8110125)

WELSH, Joseph v. Federal Aviation Administration (NY035118210036)

WILFORD, Dennis I. v. Department of the Navy (SE075209042)

WILLIAMS, Rudolph v. Department of Commerce (DC03518110465ADD)

WILSON, Elizabeth v. Office of Personnel Management (CH831L8110526)

WOOTEN, Stanley J. v. Department of the Air Force (SF03518110413)

PETITIONS FOR REVIEW DENIED – AIR TRAFFIC CONTROLLERS

BONEFAS, James W. v. Department of Transportation, Federal Aviation Administration (DA075281F0684)

CHACON, Gerardo v. Department of Transportation, Federal Aviation Administration (DA075281F1032)

HALES, David E. v. Federal Aviation Administration (AT075282F0090)

MATSAYKO, Vincent J. v. Department of Transportation, Federal Aviation Administration (DA075281F1581)

MORTON, James v. Department of Transportation, Federal Aviation Administration (DA075281F1364)

RAWLS, Ashburn, Jr. v. Federal Aviation Administration (AT075282F0265)

RAYNOR, John E. v. Federal Aviation Administration (AT075281F0094)

PETITIONS FOR REVIEW DISMISSED

ADAMS, Melvin v. U.S. Postal Service (CH07528110601)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, Local 2094 (Glenn Scott) v. Veterans Administration Medical Center (HQ71218210012)

ARNOLD, Harold M. v. United States Marine Corps (AT07528110891)

BATTLES, William H. v. Department of the Army (HQ71218110045)

BEDFORD, Howard Ray v. Department of the Air Force (HQ71218010049)

CARRUTHERS, Harold v. Defense Logistics Agency (AT07528110492)

JOHNSON, Donald A. v. United States Postal Service (SF07528010346)

OFFICE OF LEGISLATIVE AND PUBLIC AFFAIRS LEGAL DEFENSE COMMITTEE, Petitioner v. Theodore Bell and Donald Devine (HQ12058210003)

WINNETT, William D. v. Department of the Treasury (AT07528210004)

INITIAL DECISIONS AFFIRMED OR AFFIRMED AS MODIFIED

HIGGINS, Joseph J. v. Department of Health and Human Services (DC07528010318)

HOLCOMBE, Thomas L., Jr. v. Veterans Administration (AT075299076)

JACKSON, Frederick J. v. Department of the Treasury (DE07528110072)

KIERNAN, Patrick v. Department of the Army (SF07528110646)

LAUGHLIN, Thomas J. v. U.S. Postal Service (CH07528110313)

LEMONS, Billy J. v. Department of the Air Force (DA752B90136)

LOFTON, Jimmy D. v. Department of Health and Human Services, Social Security Administration (SF07528110450)

MCGILL, Paul R. v. Tennessee Valley Authority (AT03518110335)

MORGAN, Arnold J. v. U.S. Postal Service (PH07528110274)

OMMAYA, Ayub K. v. National Institutes of Health, Department of Health and Human Services (DC53108010316)

PACE, William H. v. Veterans Administration (NY07528110128)

PELLUM, Nettie M. v. Veterans Administration (SF07528110228)

POPE, James C. v. Department of Transportation (SE07528210074)

WILLIS, Wilbur L. v. Department of the Army (SF07528110025)

ZEBEAU, Leonard R. v. Department of the Army (DA07528110041)

INITIAL DECISIONS REVERSED

BARBOUR, Andrew M. v. Department of Defense (PH07528110053)

CUSICK, Margaret v. U.S. Department of the Army (PH07528110188)

GAYHEART, Teddy B. v. Department of the Army (SF03518010525)

GREENE, Joseph R. v. Office of Personnel Management (AT831L8010350)

HATTRUP, Roger D. v. Department of the Navy (SE07528010082)

KIRKMAN, William E. v. Department of the Navy (PH075209105)

PERSON, Valerie D. v. Social Security Administration (CH07528110104)

CASES REMANDED TO REGIONAL OFFICES

JENKINS, Leroy v. U.S. Postal Service (AT07528110120)

LELAK, George v. Department of Health and Human Services (CH07528110184)

PRESTON, Terry A. v. Department of the Army (SE07528010061)

RICHARDSON, Nelson L. v. Tennessee Valley Authority (AT03518110299)

SARICH, John T. v. Department of the Interior, Bureau of Land Management (SE03518110035)

AGENCY ACTION AFFIRMED

BORSARI, Peter D. v. Federal Aviation Administration (NY075209163)

APPEALS DISMISSED

KEY, Eleanor F. v. Department of the Interior (SF03518010252)

RUBIO, Jesus v. Department of Health and Human Services (SF07528110666)

BOARD ORDERED THAT INITIAL DECISION IS FINAL DECISION

WILLIAMS, Richard L. v. United States Postal Service (DC075209236)

BOARD DISMISSED PETITION FOR REOPENING

ARNOLD, Harold M. v. U.S. Marine Corps (AT07528110891)

AGENCY ORDERED TO REMIT AWARD OF ATTORNEY FEES

BETZ, Helen L. v. U.S. Department of Housing and Urban Development (SF03518010228ADD)

COUNSEL ORDERED TO FILE BRIEF IN RESPONSE TO BOARD'S ORDER

LENOX, Margaret v. Office of Personnel Management (DA08318210396)

LENOX, Merle v. Office of Personnel Management (DA08318210253)

BOARD CONCURRED WITH AND ADOPTED DECISION OF EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

HANEY, Oscar Jr. v. U.S. Postal Service (DA075209252)

MOTION FOR RECONSIDERATION DENIED

BURROWS, Earl A., Jr. v. Government of the District of Columbia (DC03518010087)

MCKENZIE, Chester V. v. Government of the District of Columbia (DC03518010087)

WARD, C. Marvin v. Government of the District of Columbia (DC03518010087)

MOTION TO REVIEW INTERLOCUTORY RULING DENIED

CONWAY, Teresa A. v. Department of the Army (DC07528210755)

REGULATION REVIEW DENIED

JOSEPH, Warren M. v. Donald J. Devine, Director, Office of Personnel Management and Roscoe L. Egger, Jr., Commissioner, Internal Revenue Service (HQ12058110067)

CASES ASSIGNED TO ADMINISTRATIVE LAW JUDGES

EASTWOOD, Mary O. v. Office of Special Counsel (DC07528211225)

DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION v. James L. Davis, Jr., Administrative Law Judge (HQ75218210026)

DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION v. Kenneth P. Glover, Administrative Law Judge (HQ75218210025)

POPE, James C., Appellant v. Department of Transportation, Respondent (SE07528210074)

SCHWARTZ, Frederick W., Appellant, v. Department of Transportation, Respondent (DC531D8210170)

SPECIAL COUNSEL v. Guadalupe Saldana (HQ12068210023)

TRYBUL, Theodore S. v. Department of the Army (HQ35928210018)

CASES UNDER THE SPECIAL COUNSEL

SPECIAL COUNSEL v. Department of Labor (HQ120800009)

REQUESTS FOR EXTENSIONS OF TIME DENIED

JOHNSON, Delores v. Department of Housing and Urban Development (AT07528210364)

MCCLOSKEY, William v. Internal Revenue Service (PH531D8010040)

THOMPKINS, James M. v. United States Postal Service (NY07528210135)

REQUESTS FOR EXTENSIONS OF TIME GRANTED

ADKINS, Ralph A. v. Department of Housing and Urban Development (AT07528110116)

CLARK, Julia G. v. Department of the Navy (AT07528210463)

FLANAGAN, Roxanne v. Department of Education (DC03518210640)

FROEHLICH, Vincent A., Jr. v. Internal Revenue Service (PH07528110476ADD) and (PH07528110606ADD)

JOHNSON, Delores v. Department of Housing and Urban Development (AT07528210364)

KERR, John H. v. National Endowment for the Arts (BN7528010005-Comp.)

MALAZO, Concepcion M. v. Internal Revenue Service (DC07528210484)

MARTIN, Sam A., et. al. v. Department of Labor, Mine Safety and Health Administration (SL07528210074)

MOORE, Clarence v. U.S. Air Force (SF07528111084)

OVERSTREET, Elizabeth A. v. U.S. Department of Energy (DC03518210464)

PHELPS, Frances M. v. Equal Employment Opportunity Commission (SF03518210430)

PRICE, Patricia D. v. United States Army, U.S. Army Corps of Engineers, Memphis District, Memphis, TN (AT07528110660)

PROTOPAPA, Sejfi v. Department of Transportation (BN03518210080)

SHERWOOD, Frank R., Jr. v. Department of Interior (DE03518210011)

WILLIAMS, James W., Jr. v. General Services Administration (DE07528210040)

YELLOWBIRD, Charles W. v. Department of Interior (DE03518210028)

ERRATA

BURROWS, Earl A., Jr. v. Government of the District of Columbia (DC03518010087)

LOFTON, Jimmy D. v. Department of Health and Human Services, Social Security Administration (SF07528110450)

MCKENZIE, Chester v. Government of the District of Columbia (DC03518010087)

RENEHAN, John L. v. Department of the Army (PH531D09011)

SMYTH, Donald v. Department of the Treasury (CH075209204)

WARD, C. Marvin v. Government of the District of Columbia (DC03518010087)

JULY CASES

ADVERSE ACTIONS

RONALD A. DOBROSKI v. DEPARTMENT OF JUSTICE, U.S. MARSHALS SERVICE (Docket No. SF07528010278)
July 20, 1982

1.332; 4.210; 10.122; 14.700

Appellant filed an appeal with one of the Board's Regional Offices from a removal action based on the agency's determination that appellant, while in an off-duty status, violated Rule 21 of the agency's Table of Offenses and Discipline which prohibits employees from engaging in either criminal, dishonest, infamous or notoriously disgraceful conduct. The agency alleged that appellant entered a retail store, placed merchandise in his front pants pocket and departed the store without paying for the merchandise, and, that upon being approached by the store's security officers, appellant improperly displayed his law enforcement credentials. Appellant contended that he did not take the merchandise with the intention of not paying for it, and, that under the circumstances, the penalty was inappropriate.

In the initial decision, the presiding official reversed the removal action finding that the agency had not proven by a preponderance of the evidence that appellant had intentionally removed the merchandise from the store without paying for it; that appellant was not headed in the direction of the store's entrance so that he could pay for the merchandise; and, that the evidence of record did not sustain the specification that appellant had improperly displayed his law enforcement credentials.

The agency, in its petition for review, alleged that the initial decision was based on an erroneous interpretation of statute and regulation. The Board granted the petition for review, stating that the agency challenged factual determinations and that the petition for review made reference to specific evidence that supported the agency's position. The Board found that the record supported a finding that the conduct occurred. The Board stated that implicit in a charge of criminal, dishonest or disgraceful conduct for removing merchandise from a store without paying is the allegation that appellant did not intend to pay for it. The Board has previously stated that intent is a state of mind which is generally proven by circumstantial evidence. *See Filson v. Department of Transportation*, MSPB Order No. AT075209304 (July 14, 1981). The Board felt that appellant's admission that he left the store without making payment for the merchandise was circumstantial evidence of wrongful intent, and facts leading to any inference had to be proven. The Board noted that the inference drawn when one places merchandise in his pants pocket instead of his shopping cart, covers it with his coat and walks out of the store without making payment, is that the act was intentional. The Board further noted that the facts on which this inference was drawn were admitted by appellant and supported by the testimony of two security officers. Contrary to the presiding official's determination, the Board concluded that this specification was supported by a preponderance of the evidence as required by 5 U.S.C. §7701(c)(1) and 5 C.F.R. §1201.56(a)(1)(ii).

The Board felt, having sustained only one of the two charges, that the efficiency of the service would be served by the imposition of some disciplinary action, but, in the absence of a prior disciplinary record, removal was not a reasonable penalty. The Board, therefore, determined that an appropriate penalty in this case was that appellant be downgraded to a non-supervisory position.

Accordingly, the initial decision was reversed in its finding that the agency specification was not supported by a preponderance of the evidence. The agency was ordered to cancel the removal action and to demote appellant to a non-supervisory position.

BERNARD MONCZEWSKI v. DEPARTMENT OF THE AIR FORCE (Docket No. DA07528110443)
TIMOTHY SHOWS v. DEPARTMENT OF THE AIR FORCE (Docket No. DA07528110442)
GERALD SMITH v. DEPARTMENT OF THE AIR FORCE (Docket No. DA07528110441)
THOMAS VAUGHN v. DEPARTMENT OF THE AIR FORCE (Docket No. DA07528110423)
July 1, 1982

1.110; 1.600; 4.210; 11.140

Appellants were removed for their failure to comply with orders from their supervisor to return to their duty stations. The presiding official found that the evidence supported the charge, but, that the action was taken in reprisal for appellants' having testified at a grievance hearing.

The agency, in its petition for review, contended that the evidence did not establish a causal connection between the protected activity and the adverse action. The agency also argued that the removal should not have been reversed unless it was shown that the appellants would not have been removed but for their participation in the grievance proceeding.

The Board has previously determined that a claim of reprisal by an employee who testifies in a grievance proceeding constitutes an allegation of a prohibited personnel practice under 5 U.S.C. §2302(b)(9). *See Bodinus v. Department of the Treasury*, MSPB Order No. CH07528010016 at 5 (August 27, 1981). The presiding official in this case stated that an appellant, in establishing a prima facie violation of section 2302 (b)(9) must demonstrate that he engaged in an activity protected by the section; that he subsequently was treated in an adverse manner by the employer; that the employee was engaged in the protected activity; and that there is a causal connection between the protected activity and the adverse action.

Appellants had engaged in the protected activity of testifying at a grievance hearing. Both the proposing official and the deciding official had actual knowledge that appellants had testified. The agency did not dispute the facts but contended that there was no showing of causal connection. The presiding official addressed the causal connection issue and set forth all the evidence to establish the connection. The record also reflected that the charges were connected to the participation of the appellants in the grievance hearing. The agency objected to the presiding official's reliance on the facts to support an affirmative defense of reprisal.

The Board, however, after considering the agency's contentions and the other evidence of record, and because the causal connection generally is drawn from circumstantial evidence such as that relied on by the presiding official, did not find that the agency showed any error in the presiding official's evaluation and conclusion in this connection. Therefore, the Board found that the appellants did establish prima facie evidence of violations of section 2302(b)(9).

The presiding official examined the appropriateness of the removal considering the seriousness of the offense, length of service, past disciplinary record, effect of the offense on performance, alternative sanctions to deter such conduct in the future and mitigating circumstances. The Board noted that in each case appellants failed to respond immediately to their supervisor's orders because the employee representative in the grievance had asked to speak to them. The delay in time was under five minutes. The presiding official found appellants' conduct to be minimal. The Board agreed with this evaluation and felt that management's concern was overstated and not serious enough under the circumstances to override the presiding official's finding. The presiding official decided that a written reprimand for this conduct was the most stringent penalty the agency should have considered and the Board agreed with this decision.

The Board, therefore, found that the agency did not establish any error in the presiding official's evaluations or conclusions in deciding to reverse the removals.

Accordingly, the initial decision in each case was affirmed.

ATTORNEY FEES AND DISABILITY RETIREMENT

ROLAND E. VERGAGNI v. OFFICE OF PERSONNEL MANAGEMENT (Docket No. DC831L8010270ADD)

July 19, 1982

6.100; 6.900; 14.520; 15.400

Appellant's application for disability retirement was disallowed by the Office of Personnel Management (OPM). On appeal to one of the Board's Regional Offices, the presiding official reversed OPM's determination and found appellant totally disabled for the performance of the duties of his position. Appellant timely filed for attorney fees pursuant to 5 C.F.R. §1201.37(a).

In his addendum decision, the presiding official concluded that under the standards set out by the Board in *Allen v. U.S. Postal Service*, 2 MSPB 582, 593 (1980) for determining the appropriateness of an award of attorney fees, appellant was entitled to an award of attorney fees.

In its petition for review, OPM failed to address the specifics of the presiding official's finding that attorney fees were warranted in this case. Rather, it contended that the provisions of section 7701 were inapplicable to the review of its retirement determinations and that the presiding official improperly awarded attorney fees under 5 U.S.C. §7701(g). The Board found no merit to OPM's jurisdictional arguments, but agreed that the award of attorney fees was improper in this case.

The Board noted that while section 7701 applies to all disability retirement matters, it found it necessary to consider whether an award of attorney fees to an applicant for disability retirement could be warranted in the interest of justice. The Board is accorded substantial discretion in determining when an award is warranted. However, the Board concluded that Congress did not contemplate attorney fees awards to be in the interest of justice in employee-initiated disability retirement cases. The Board further noted that applicants who voluntarily file for disability retirement could not be said to have been dragged through a lengthy and costly legal proceeding while substantially innocent of the charges leveled against them. Moreover, OPM does not level any charges against such applicants and does not initiate the proceedings. Except in cases involving agency-initiated disability retirement proceedings, the employee initiates the legal proceeding in order to establish his entitlement to benefits.

The Board further noted that the U.S. Court of Appeals for the D.C. Circuit stated, in regard to an award of attorney fees in Special Counsel Corrective Action proceedings, that the policy underlying the attorney fees provision contained in section 7701(g) is applicable to proceedings in which an aggrieved employee seeks to vindicate rights conferred by the Civil Service Reform Act of 1978. The Board held that disability retirement applicants who appealed an OPM disallowance could not be considered aggrieved employees, since they initiated the statutory proceedings voluntarily.

Accordingly, the Board found that an administrative decision on an appellant's claim of entitlement to disability retirement annuity could not be considered an agency action within the meaning of section 7701(g). Therefore, the Board concluded that an award of attorney fees to an individual in a disability retirement proceeding could only be in the interest of justice in cases involving agency-initiated disability retirement actions taken pursuant to Part 831L of 5 C.F.R. The Board also concluded that since involuntary disability retirement proceedings are similar to adverse action proceedings, fees may be awarded only against the agency that initiated the proceeding, rather than OPM.

Accordingly, OPM's petition for review was granted and the addendum decision was vacated.

OTHER JULY ISSUANCES

PETITIONS FOR REVIEW DENIED

ADDISON, Henry v. U.S. Department of Health and Human Services (PH07528110524)

ALLEN, Hilburn D. v. Department of the Army (DC07528110452)

ALVAREZ, Rosa v. Veterans Administration (DC03518110342)

AMES, Michael v. U.S. Postal Service (DA07528010309)

ANDERSON, Charles v. Department of the Navy (PH07528110470)

ASHLEY, Marian E. v. Department of Housing and Urban Development (AT03518110469)

AUSTIN, Virgil K. v. U.S. Department of the Air Force (DA07528010174)

BACOTE, Ronald v. Department of the Navy (PH07528110057)

BANKS, Lawrence v. Department of the Air Force (CH075209065)

BARNWELL, Dinardo T. v. U.S. Government Printing Office (DC03518110355)

BATTISTA, Jacqueline A. v. Department of the Army (DC07528110517)

BEYARD, Audrey v. Department of the Navy (SF07528110357)

BIVENS, Noel W. v. Department of the Interior (DE03518210016)

BOYCE, Robert E. v. United States Postal Service (CH07528110613)

BOYLAN, Vincent L. v. United States Postal Service (AT07528110462)

BRANDENBURG, William, Jr. v. Department of the Air Force (DA315H8110644)

BROWN, Bruce E. v. Department of Justice, Immigration and Naturalization Service (SF07528010170)

BUESCHER, Wilbur L. v. Department of the Treasury (CH07528110105)

BUTLER, Lester v. Department of the Interior (PH03308110450)

BUTLER, Louis v. Department of the Interior (PH03308110451)

CAVINESS, James A. v. U.S. Department of the Army, Soldier Support Center (CH03518010203)

CHAPPELL, Steven v. Social Security Administration (NY531D8110208)

COEFIELD, Earlie W. v. United States Government Printing Office (DC07528110599)

COMPTON, Robert v. Department of Energy (SL03518110160)

COVINGTON, Sidney L. v. Department of the Interior (DE03518210018)

CUPIDO, Joseph R., Jr. v. Department of Transportation (DE07528110069)

CURRY, Tom J., Jr. v. Department of the Treasury (CH315H8210167)

DALESANDRO, Rachel v. Department of the Navy (NY07528110409)

DAVIS, Ulysee v. Department of the Navy (DC07528210420)

DEUTSCH, Stephen v. Department of Defense (SF07528010434)

DONATICH, Alex v. Department of the Interior (DE03518210019)

DREHER, David v. United States Postal Service (SF07528110789)

DUNN, Michael V. v. U.S. Department of Agriculture (DC03178110160)

ELBER, Martin v. Veterans Administration (SE07528110083)

ENGLISH, Charles S. v. Office of Personnel Management (RB083190154)

FULLMER, Ellio L. v. Department of the Army (DE07528110077)

GOETZ, Phillip R. v. Department of the Interior (DE03518210017)

HADJIAN, Farrokh v. United States Postal Service (SF07528010117)

HAMMOND, Jack v. U.S. Postal Service (SF07528111867)

HANING, Jack M. v. Department of Labor (SE07528110172)

HERNANDEZ, Gregory v. Department of the Navy (SF07528010455)

HETTINGER, Robert D. v. Department of the Interior (DE03518210020)

HOLLIDAY, David C. v. Department of the Army (AT03518110124)

HOUSTON, Major L. v. United States Postal Service (CH03538110181)

IGNACIO, Florentina v. Department of the Air Force (SF07528010400)

IMAZUMI, Alice D. K. v. Department of Health and Human Services (SF315H8110836)

JACKSON, Deborah E. v. Government of the District of Columbia (DC03518110185)

JAMES, William, Jr. v. Department of State (DC352C8110752)

JONES, Howard R. v. Veterans Administration (CH07528110629)

KING, Cletus, E., Jr. v. Department of the Interior (DE03518210021)

KONRAD, Agnes G. v. Department of the Treasury (PH07528110228)

KURTZ, Oscar J. v. Government of the District of Columbia (DC03518010114)

LANDERS, Eric H. v. Department of Transportation, Federal Aviation Administration (AT075281F2623)

LEISER, Douglas v. Federal Aviation Administration (AT075282F0119)

LEOPARD, Katherine v. Department of the Navy (AT07528110733)

LIEBER, Llewellyn L. v. Department of Defense (SF03518010160)

LOCHREN, Walter v. Department of the Army (NY07528110236)

MALINAY, Quintin F. v. Office of Personnel Management (SF08318110862)

MARSHALL, Thomas B. v. U.S. Department of Agriculture (DC03178110160)

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NOTES ON KEY NUMBERS

Summarized Board orders are indexed according to the key number system used in the published volumes, *Decisions of the United States Merit Systems Protection Board*. The index numbers listed after each caption show the subjects found in the decision. In the published volumes, the indexes will include citations of the decisions under the same numbers allotted to them here. There are 18 main subject areas. These are described under Major Topics and Scope Notes. The Outline of Topics divides each major topic into more specific subtopics.

MAJOR TOPICS AND SCOPE NOTES

Topic

1.000000 ADVERSE ACTIONS

Certain personnel actions are designated as "adverse actions" under Chapter 75 of the Civil Service Reform Act of 1978. This topic references Board opinions relating to the substantive law governing those actions and distinguishes other personnel actions not designated as "adverse actions" under Chapter 75. This topic also encompasses cases involving Board consideration of penalties in adverse action cases including the mitigation of penalties. Board cases concerning procedures governing adverse actions are located under *Practice and Procedure (10.000000)*, and opinions relating to jurisdictional matters have been placed under *Jurisdiction (6.000000)*. Cases regarding remedies available to the Board in adverse action cases are located in *Remedies (14.000000)*.

2.000000 CONSTITUTIONALITY

This topic references opinions in which the Board has considered constitutional aspects of cases before it. Included are claims pursuant to specific constitutional provisions, as well as claims derived from constitutional provisions, such as the right to privacy. Constitutional claims relative to discrimination are in *Discrimination (3.000000)*.

3.000000 DISCRIMINATION

This topic refers to Board cases concerning the substantive law of prohibited discrimination pursuant to the Civil Service Reform Act of 1978. Also included are cases relating to affirmative action and disparate treatment of similarly situated employees. Questions of evidence, jurisdiction, practice and procedure, and remedial action in discrimination cases are referenced in *Evidence (4.000000)*, *Jurisdiction (6.000000)*, *Practice and Procedure (10.000000)*, and *Remedies (14.000000)*, respectively.

4.000000 EVIDENCE

This topic references cases dealing with substantive rules of evidence employed by the Board, as well as cases concerning the harmful error standard in the Act. The Board is bound by statutory burdens of proof, and cases referencing the Board's interpretation of such burdens are also included here.

5.000000 FREEDOM OF INFORMATION, PRIVACY, AND SUNSHINE ACTS

This topic references Board cases relating to the Freedom of Information, Privacy, and Sunshine Acts.

6.000000 JURISDICTION

This topic includes cases in which the Board has made specific reference to jurisdiction under the Civil Service Reform Act of 1978, as well as cases dealing with issues of justiciability. Since the jurisdiction of the Board differs with respect to certain entities, this topic includes cases dealing with jurisdictional questions particularly related to such entities. Included also are Board cases dealing with its enforcement power, which is a matter of continuing jurisdiction, and cases under the Act's savings provision. Jurisdiction over appeals related to retirement is covered under *Retirement (15.000000)*.

7.000000 LABOR-MANAGEMENT RELATIONS

This topic contains cases arising under Title VII of the Act, including collective bargaining issues and the rights of individual employees. Title VII grievance procedure cases brought before the Board are also located under this topic.

8.000000 PARTICULAR EMPLOYMENT CATEGORIES

The Civil Service Reform Act of 1978 has provisions specifically applicable to certain categories of employees. This topic references cases in which the special procedural and substantive law applicable to such employee categories were discussed by the Board, and in which such special provisions were ger-

mane to the resolution of the case. Included are cases dealing with the merit pay provisions of the Act and the Senior Executive Service.

9.000000 PERFORMANCE RELATED ACTIONS

This topic references cases dealing with performance related actions under Chapter 43 of the Act, including procedural rights and standards of proof under Chapter 43, where performance appraisal systems have been implemented. Also included are cases dealing with performance appraisal actions under Chapter 75, where Chapter 43 appraisal systems have not yet been implemented.

10.000000 PRACTICE AND PROCEDURE

This is the major topic referencing cases which set out the procedural rules for matters before the Board, its administrative law judges, and its presiding officials. Matters such as timeliness and technical filing rules are included here, as well as the concepts of former adjudication and representation of parties.

11.000000 PROHIBITED PERSONNEL PRACTICES

The Civil Service Reform Act of 1978 lists merit systems principles governing the Federal work force and defines prohibited personnel practices that may not be taken against Federal employees. This topic is limited to cases in which the Board has interpreted these provisions and related matters.

12.000000 REDUCTIONS IN FORCE

This topic refers to Board cases dealing with reductions in force, including agency justifications for taking such actions and the substantive and procedural rights of employees affected.

13.000000 REGULATION REVIEW

The Civil Service Reform Act of 1978 empowers the Board to review regulations promulgated by the Office of Personnel Management and implementing regulations of other agencies. This topic references Board opinions dealing with such regulation review.

14.000000 REMEDIES

This topic references Board cases dealing with the remedial powers of the Board.

15.000000 RETIREMENT

This topic refers to Board cases involving issues relating to the retirement of Federal employees.

16.000000 SPECIAL COUNSEL

This topic references Board cases relating to the Office of Special Counsel, including the prosecution of Hatch Act cases and violations of the Federal Employees Flexible and Compressed Work Schedules Act. The filing requisites for complaints before the Special Counsel are included here, while procedural requisites in Special Counsel cases before the Board are in *Practice and Procedure (10.000000).*

17.000000 SUITABILITY AND FITNESS FOR DUTY EXAMINATIONS

This topic references cases dealing with issues of suitability. Included also are cases involving fitness-for-duty examinations.

18.000000 EMPLOYMENT PRACTICES

This topic references cases concerning the substantive law governing employment practices and distinguishes employment restrictions that are not appealable employment practices.

OUTLINE OF TOPICS

(With Key Numbers)

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FOR YOUR INFORMATION

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DEFINITIONS

These definitions are provided for clarification purposes only and are not intended to convey the strict legal meaning of the term.

Deciding Official—the official who renders the agency's decision.

Regional Office—the Board office authorized to receive appeals from the area where the appellant's duty station was located when the agency action was taken; there are 11 MSPB regional offices.

Initial Decision—the regional office decision made by the presiding official in response to a petition for appeal. The initial decision becomes final in 35 days unless a petition for review is filed with the Board and granted. In that case, the Board's decision becomes the final decision. If the petition for review is denied, the initial decision becomes final five days after the issuance of the denial.

Petition for Appeal—the request filed with a Board regional office for review of an agency action.

Petition for Review—the request filed with the three-member Board in Washington, D.C., for review of an initial decision of a presiding official.

Presiding Official—any person designated by the Board to preside over any hearing or to make a decision on the record. The presiding official referred to in the DIGEST summaries is usually a Board regional office official designated by the Board to perform these duties.

Proposing Official—the agency official who initiates an action to be taken against an employee.

Addendum Decision—an addendum decision deals with attorney fees.

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AUGUST 1982

Volume 2, No. 11

UNITED STATES MERIT SYSTEMS PROTECTION BOARD

Washington, D.C. 20419

MS 1.11:

United States Merit Systems Protection Board

Herbert E. Ellingwood
Chairman

Ersa H. Poston
Vice Chair

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ADVERSE ACTIONS

RICHARD A. BAUER v. DEPARTMENT OF THE TREASURY (Docket No. SF07528110007)
August 12, 1982

1.121; 10.1322; 15.132; 17.410

Appellant, a criminal investigator, appealed the agency's action placing him on enforced leave, contending that such action was tantamount to suspension. The presiding official, finding that the evidence did not support appellant's contention, dismissed the appeal for lack of jurisdiction.

In arriving at his decision, the presiding official referred to *Mosely v. Department of the Navy*, 4 MSPB 220, 221 (1980), which outlined the questions to be applied in determining whether enforced leave constituted suspension. They were as follow:

1. Was the appellant placed on sick leave without his consent?
2. Was the appellant, in fact, ready, willing, and able to work during the period of leave?
3. Was the enforced leave used in a personal, disciplinary type of situation?

Appellant disagreed with the presiding official's decision and filed a petition for review, contending that the three points of the test regarding enforced leave were satisfied in his case.

In discussing appellant's case, the Board noted that the medical and other evidence concerning appellant's mental condition was conflicting. The Board explained that according to *Weaver v. Department of the Navy*, 2 MSPB 297, 298-299 (1980), if conflicting evidence is presented, due deference will be accorded to the credibility findings of the presiding official. After consideration of appellant's disagreement with the presiding official's conclusions, the Board agreed with the finding in the initial decision that appellant had not shown he was ready, willing and able to work during the enforced leave period.

The Board disagreed with the appellant's contentions about the agency's motive for placing him on enforced leave and explained that placing an employee on enforced leave status did not constitute initiating a disciplinary action against the employee. The Board explained that by placing an employee on enforced leave pending a fitness-for-duty examination, the agency recognizes that the employee's problem may be medical and opts for enforced leave as an alternative to initiating immediate adverse action proceedings. The Board found that in appellant's case, the agency's action was a reasonable step to take to address the substantial number of complaints the agency had received concerning appellant's behavior and to ensure the safety of appellant, his co-workers and others.

Accordingly, the Board denied the petition for review, finding that appellant failed to prove that the Board had jurisdiction over his appeal.

WALTER W. CHANDLER v. DEPARTMENT OF THE TREASURY (Docket No. DA07528110283)
August 23, 1982

1.120; 8.230; 1.370; 11.141; 1.400; 1.430; 1.420; 1.3711; 1.371

Appellant was suspended for 30 days from the position of customs pilot for two charges of misconduct and upon consideration of his prior disciplinary record. The charges against appellant stemmed from his confrontation with two men who were blocking his driveway with a van and who appellant believed to be dangerous. According to the evidence of record, appellant threatened to call the police but instead approached the men with his service revolver and badge, hoping that by displaying his weapon and credentials he would persuade the men to leave. As a result of appellant's handling of the situation, the agency charged him with using his credentials for improperly enhancing his prestige and with unnecessary public display of an official weapon. In the initial decision, the presiding official found that appellant's suspension promoted the efficiency of the service and that appellant had not shown that the agency's action was tainted by harmful procedural error and prohibited personnel practices, as he had alleged. Appellant petitioned for review of the initial decision.

The Board discussed appellant's contention that use of agency weapons and credentials in non-duty situations may be reasonable in some cases. The Board agreed with the presiding official that appellant's conduct was not reasonable, since the record indicates he left his wife alone with the supposedly dangerous men while he went to retrieve his weapon and then he confronted the men after it appeared that they were preparing to leave. The Board concluded that appellant was displaying his badge and gun to garner prestige and thus gain advantage over members of the public.

The Board also considered appellant's contention that the agency's action was the result of his filing grievances and testifying against the agency. The Board explained that according to *Gerlach v. Federal Trade Commission*, MSPB Docket No. DC07528010020 at 9-10 (December 15, 1981), such allegations require the employee to show that his protected conduct was a motivating factor in initiating the personnel action, and, if proven, require the agency to show that it would have taken the same action had the employee not engaged in protected conduct. In appellant's case, the Board, noting that appellant had previously misused his credentials, determined that the agency's action against appellant was warranted and that the agency had met its burden of showing that it would have taken the action against appellant regardless of his protected activities. Further, the Board found nexus between appellant's conduct and the efficiency of the service in that appellant's conduct threatened the agency's dependence upon its armed employees to use good judgment and to avoid endangering the public.

Discussing the appellant's allegation that he was disparately treated, the Board explained that according to *Douglas v. Veterans Administration*, MSPB Docket No. AT075299006 at 24 (April 10, 1981), the Board may consider whether the penalty an agency levies in a case is proportionate to penalties given other employees for similar offenses. In appellant's petition for review, he cited other cases of misconduct by agency employees, and compared their penalties to his. However, the Board saw no similarity between appellant's offense and the other cases. Accordingly, the Board affirmed the initial decision as modified and sustained appellant's 30-day suspension.

EUGENE P. HALL v. U.S. POSTAL SERVICE (Docket No. DC075209208)
August 16, 1982

1.3711; 1.511; 2.230

Appellant was suspended indefinitely from the position of tour supervisor when he was arrested, charged with receiving stolen merchandise, and bound over for grand jury action at a preliminary hearing.

Before the appellant was indefinitely suspended, he was given a 30-day emergency suspension based on his arrest and the charges against him. When appellant appealed both actions, the Board's regional office considered them jointly but issued separate initial decisions. The presiding official reversed the 30-day emergency suspension, finding that it did not promote the efficiency of the service and sustained the indefinite suspension, finding that an agency may temporarily remove an employee from duty while awaiting a formal decision on his guilt or innocence.

In considering appellant's petition for review of the initial decision regarding the indefinite suspension, the Board noted that in *Martin v. Department of the Treasury*, MSPB Docket No. AT075209044 (June 1, 1982), it had explained that in order for an indefinite suspension to be lawful, the agency must establish "reasonable cause" to believe that the employee has committed a crime for which imprisonment may be imposed, as well as a nexus between the alleged crime and the employee's position. The Board added that *Martin* requires that the penalty imposed be reasonable and that the suspension be temporary.

The Board determined that in appellant's case, his arrest and detention for further legal action sufficiently established "reasonable cause." Further, the Board found nexus clearly established because appellant, who held a responsible position supervising over 100 employees, had cast doubt on his trustworthiness. The Board also agreed that the penalty in appellant's case was reasonable, noting the agency's argument that appellant, a management official, had compromised his obligation to conduct himself in a manner that would not discredit the agency, and that employees would lose respect for their supervisors if action were not taken to address appellant's conduct. Finally, the Board noted that the initial decision provided that the temporary suspension would end when the criminal charges against appellant were resolved. Since the appellant submitted, with his petition for review, a court order indicating that he had been acquitted of grand larceny, the Board determined that the agency should terminate the indefinite suspension when notified of the acquittal. Accordingly, the Board affirmed the initial decision as modified, sustaining appellant's indefinite suspension and ordering the agency to terminate such suspension.

ELROY W. HOBBS v. DEPARTMENT OF HEALTH AND HUMAN SERVICES (Docket No. PH07528010104)
August 6, 1982

1.3321; 1.3711; 1.511; 1.512

After indictment by the state grand jury for violation of laws concerning the possession and distribution of controlled substances, appellant was suspended from his position of laborer pending investigation by the agency. Appellant petitioned the regional office for appeal of his suspension, contending that the agency had insufficient cause to impose an indefinite suspension in his case.

In the initial decision, the presiding official reversed the agency's action, and the agency petitioned for review of that decision. The agency argued that the presiding official erred in two respects—first, in finding that an indictment alone was not evidence of guilt and thus that the agency had no "reasonable cause" to believe that appellant had committed a crime for which a prison sentence could be imposed. Second, the agency disagreed with the presiding official's finding that no nexus existed between appellant's alleged crime and the efficiency of the service.

The Board agreed with the agency's contentions. The Board explained that in *Martin v. Department of Treasury*, MSPB Docket No. AT075209044 at 9 (June 1, 1982), it held that an indictment is sufficient to establish reasonable cause for believing that an employee has committed a crime for which imprisonment could be imposed. Accordingly, in appellant's case, the Board determined that appellant's indictment alone sufficiently constituted reasonable cause and, thus, that new evidence submitted by the agency with its petition for review was unnecessary.

The Board also determined that appellant's indictment, by affecting agency morale and by generating adverse publicity, disrupted agency operations and therefore was sufficient to establish nexus. However, the Board noted, as it had held in *Merritt v. Department of Justice*, MSPB Docket No. PH075209058 at 29 (June 8, 1981), that agencies need not wait for adverse effects of an employee's conduct before taking action.

Accordingly, the Board reversed the initial decision and sustained the agency's action of suspending appellant indefinitely pending agency investigation of his arrest and indictment.

SERAFIN V. ISIP v. DEPARTMENT OF THE NAVY
(Docket No. SF075209236)
August 6, 1982

1.331; 1.561; 4.210

Appellant was removed from the position of office services supervisor based on a charge of "theft of U.S. mails." The charge was the result of a search which revealed 30 pieces of undelivered mail in appellant's desk. The presiding official dismissed the appeal in this case as untimely filed. (Appellant subsequently petitioned the Board for review, and the Board found good cause for appellant's untimely appeal.) The Board vacated the initial decision dismissing appellant's appeal and remanded the case to the regional office for further proceedings.

Upon remand, the presiding official issued an initial decision finding that the agency had proven the charge of theft by a preponderence of the evidence and that appellant's removal was for such cause as would promote the efficiency of the service. Also, the presiding official reversed the emergency suspension taken against appellant during the notice period. Appellant again petitioned the Board for review, contending that the presiding official did not consider his submissions; the Board granted his petition.

In considering the petition for review, the Board discussed how, when no eyewitnesses to an alleged theft are found, inferences of guilt often are drawn where the accused is found in "exclusive possession" of stolen property. The Board explained, however, that exclusive possession did not necessarily mean that the accused had possession to the exclusion of all other persons but that "the accused must have some distinctive relationship to the property before the inference of guilt may be drawn." Citing the evidence of record, which indicated that other employees besides appellant had access to appellant's desk and that appellant was not at work the week preceding the search, the Board found that the requisite inference of guilt could not be drawn. The Board concluded that the agency failed to prove by a preponderance of evidence that appellant was the person who actually took the mail.

Accordingly, the Board reversed the initial decision regarding appellant's removal and affirmed it regarding his emergency suspension.

ROSE Y. JOHNSON v. DEPARTMENT OF THE TREASURY (Docket Nos. DC075209213 and DC075209214)
August 27, 1982

1.120; 1.512; 1.110; 1.500; 1.522; 1.520; 4.310; 1.510; 1.511; 1.513

Appellant, a record clerk, was first suspended for 30 days and then removed for allegedly threatening her supervisor with physical harm. When appellant appealed both actions, the Board's regional office considered them jointly but issued separate initial decisions. Appellant petitioned for review of both decisions, contending that the presiding official should not have sustained the emergency suspension because she was not afforded "not less than seven days" to respond to the suspension proposal and because she was not given specific reasons for the proposed suspension.

The Board noted that according to the evidence of record, appellant received both the emergency suspension and removal proposals six days before the agency issued its decision to suspend her, though, according to 5 U.S.C. §7513(b)(2), she should have been allowed "not less than seven days" to reply to the charges against her. Though the Board found that shortening the reply period in such fashion was an error and directed the agency to amend the record so as to afford appellant the proper reply period retroactively, it determined that the agency's error did not prejudice appellant's ability to present her case.

The Board noted that although appellant made an oral reply to each specification in the removal proposal, the record indicates that she did not address the suspension proposal either orally or in writing. The Board explained that since employees have the responsibility to assert their right to respond to charges, it may reasonably be inferred in appellant's case that she waived her right when she did not clearly assert her wish to answer the charges in the suspension proposal. However, the Board found that the specifications cited in the removal proposal were the same as those cited in the emergency suspension proposal, except that the removal proposal offered more detail regarding appellant's alleged threats. Since appellant and her representative orally replied to each specification in the removal proposal, the Board determined that such reply afforded her sufficient opportunity to address all the charges and that her argument that she had not been given the reasons for the proposed suspension was groundless. Accordingly, the Board affirmed the initial decision as modified, ordering the agency to amend its records so as to retroactively afford appellant retention in a duty status for the full seven-day notice period of the suspension action.

BRUCE KONBERG v. FEDERAL AVIATION ADMINISTRATION (Docket No. SF07528110668)
August 27, 1982

1.110; 1.311; 1.320; 1.410; 1.1321; 3.1313; 1.650

Appellant was removed from the position of maintenance worker for unauthorized absences. The first instance of unauthorized absence concerned three weeks of sick leave which appellant requested so that he could be hospitalized for treatment for alcoholism. This leave was granted, then converted to unauthorized leave when appellant failed to present the requested medical documentation of his absence. The second period of unauthorized leave was for 14 days when appellant did not report to work because he allegedly thought that he had been fired.

In the initial decision, the presiding official found that the preponderance of the evidence supported the charge, but also found that appellant had shown that the agency failed to meet its obligation under the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, Public Law 91-616, 42 U.S.C. §4561. Therefore, the presiding official reversed the removal and the agency petitioned for review. In its petition, the agency made two contentions, that the appellant had not properly raised the issue of the agency's obligation, under the law mentioned above, as an affirmative defense, and that it had reasonably accommodated appellant's handicap.

The Board found that the agency's first contention was no basis for granting the petition for review, since appellant raised the issue of alcoholism in his appeal, and since there was testimony at the hearing regarding his problem. However, the Board found that the agency's contention regarding reasonable accommodation was sufficient basis for granting the petition for review. The Board explained that since its lead decision on alcoholism, *Ruzek* v. *General Services Administration*, MSPB Docket No. SL075209017 (August 20, 1981), had not been issued at the time the presiding official decided appellant's case, the case should be reviewed in light of *Ruzek*.

The Board explained that in *Ruzek*, it decided that under the Rehabilitation Act of 1973, alcoholism constituted a handicap requiring reasonable accommodation. The Board further explained that its determination included as reasonable accommodation the opportunity for the employee to take sick leave for his treatment before the agency would take disciplinary action for problems resulting from the employee's alcoholism.

After consideration of the evidence of record and of its findings in *Ruzek*, the Board found that by conditionally granting appellant's request for sick leave to treat his alcoholism and by granting him annual leave to obtain documentation of his three-week absence, the agency reasonably accommodated appellant's handicap. Moreover, the Board noted that the agency's request that appellant provide such documentation was reasonable and in accordance with regulations. Further, the Board noted that appellant never claimed either that he could not obtain the requested Standard Form 71 because of his alcoholism or that his second period of absence was due to his alcoholism. Therefore, the Board found that appellant had not established that his removal was based on physical handicap discrimination. Accordingly, the Board reversed the initial decision and sustained appellant's removal.

RAYMOND L. McCLASKEY v. DEPARTMENT OF ENERGY (Docket No. SE07528110094)
August 16, 1982

1.110; 1.345; 14.700

Appellant was removed from the position of electrician based on the charge of "knowingly participating in a plan to prevent Government investigators from learning the truth about the unauthorized acquisition and use of wire paid for by the Bonneville Power Administration." When appellant appealed his removal, the presiding official in the case sustained the agency's charge but reduced the penalty to a 30-day suspension. The agency petitioned for review, stating that such a reduction in penalty was improper.

The Board discussed the circumstances surrounding appellant's removal which involved appellant's purchase of wire with his own money to replace agency supplies allegedly misappropriated by his co-workers. While the Board found that appellant's conduct did not hamper the investigation of the charges against his co-workers, it determined that it should give controlling weight to appellant's admission to the charges against him.

The Board discussed the penalty in this case, noting that the presiding official based her decision to modify the penalty on several factors, including appellant's competent job performance, his lack of personal gain from his improper conduct, and the effect the removal of a well-respected, long-time employee might have on agency morale. On the other hand, the Board noted the agency's contention that removal was the appropriate penalty in appellant's case since the agency's successful functioning depended upon employees' honesty in carrying out their duties to purchase tools and equipment.

Citing *Douglas v. Veterans Administration*, MSPB Docket No. AT075299006 at 18 (April 10, 1981), the Board explained that although it has the authority to judge whether a penalty is reasonable, the Board must give due weight to the "agency's primary discretion in exercising the managerial function of maintaining employee discipline and efficiency." Because appellant's offense jeopardized the agency's basic requirement of honesty, the Board found that removal was a reasonable penalty. Accordingly, the Board reversed the initial decision and sustained appellant's removal.

ALLEN V. PARKER v. DEPARTMENT OF THE NAVY
(Docket No. SF07528110844)
August 27, 1982

1.110; 3.130; 3.131; 3.1321; 17.400

When appellant was removed from the position of electronics mechanic based on several charges of sleeping on duty, he alleged handicap discrimination because he suffered from narcolepsy.

In the initial decision, the presiding official found that the preponderance of the evidence supported the charges. The presiding official determined that appellant was a handicapped person according to 29 C.F.R. §1613.702(a) in that he had "a physical or mental impairment which substantially limits one or more of [his] major life activities." However, he determined that appellant had not established a prima facie case of handicap discrimination since he did not articulate a reasonable accommodation for the agency to make in his case. Accordingly, the presiding official sustained the removal and appellant filed a petition for review.

The Board, citing *Stalkfleet v. U.S. Postal Service*, MSPB Docket No. SL075209055 (June 10, 1981), explained that to establish a prima facie case of handicap discrimination, an employee must show that he is a "qualified handicapped person" as described at 29 C.F.R. §1613.702(f) and that his handicap has not been accommodated by the agency. The Board further explained that 29 C.F.R. §1613.702(f) defines a "qualified handicapped person" as one who "with or without reasonable accommodation can perform the essential functions of the position in question without endangering the health and safety of [himself] or others." The Board noted that an individual may show that he is a qualified handicapped person for purposes of employment if he shows that he is a "handicapped person" as defined at C.F.R. §1613.702(a), and if he articulates a reasonable accommodation under which he can perform his duties.

The Board noted that though appellant informed the agency of his problem, he never advised his supervisors as to how they could help him with it. Moreover, the Board noted that the agency tried to accommodate appellant's problem by discussing it with him and by reassigning him to a more active job. Therefore, the Board agreed with the presiding official's finding regarding appellant's allegation of handicap discrimination and denied the petition for review.

PHILLIP T. RIGGIN v. DEPARTMENT OF HEALTH AND HUMAN SERVICES (Docket No. PH07528010273)
August 12, 1982

1.3432; 1.3711; 1.410; 4.125

Appellant was removed for falsification of a Standard Form (SF) 171, "Personal Qualifications Statement," and a Standard Form (SF) 61B, "Declaration of Appointee," and for his arrest and conviction for assault and disorderly conduct. Appellant appealed his removal, maintaining that his indication on the forms that he had not been convicted of any crimes was correct. Though appellant had been convicted of charges in 1976 and 1978, the record in this case indicated that he did not perceive such actions as convictions since he had never been imprisoned for them.

The presiding official reversed the agency's decision, finding that the agency had failed to prove that appellant's falsification of the forms had been intentional and that it had established no nexus between appellant's conduct and the efficiency of the service. Subsequently, the agency filed a petition for review.

The Board noted that the allegation of falsifying forms implied that such falsification was performed intentionally with purpose to defraud. However, in discussing *U.S. v. Egenberg* and *U.S. v. Hanlon*, the Board also noted that intent to make a false statement may be inferred when the accused recklessly disregarded whether a statement was true or consciously avoided learning the truth. The Board found appellant's failure to acknowledge his 1976 conviction credible, since appellant completed his SF-171 approximately one month before his conviction for assault and disorderly conduct. However, the Board found that appellant did intend to falsify the information on the SF-61B. The Board noted that before completing the SF-61B, appellant had been notified that the agency considered his response to the conviction question on the SF-171 unacceptable. Moreover, the Board noted that the appellant had ample opportunity to ascertain the correct status of the criminal charges against him in order to complete the forms properly.

Regarding established nexus, the Board found no evidence that the performance of either appellant or his fellow employees was affected by appellant's conduct. Though the Board found that the efficiency of the service was not adversely affected, it determined that removal was an appropriate penalty for falsification of the SF-61B. Accordingly, the Board reversed the initial decision and sustained the agency's action.

JOSEPH ROOFFENER v. DEPARTMENT OF THE AIR FORCE (Docket No. DA07528010276)
August 6, 1982

1.110; 1.311; 14.700

For unauthorized absence and failure to request leave according to established procedures, appellant was removed from the position of aircraft engine repairer.

In the initial decision, the presiding official sustained the agency's charges, finding that the agency had supported such charges by a preponderance of the evidence. Though the presiding official sustained the charges, he noted that even though appellant did fail to notify the agency of his absence, his car problem would have been a legitimate excuse for approved leave. The presiding official further noted that appellant's record revealed two previous disciplinary actions, in addition to the current charges, in his 12 years of service—a written reprimand for returning from lunch late and a five-day suspension for three hours of absence without leave.

Taking into account appellant's satisfactory work record and the small total number of hours, in his entire period of employment, he was absent without leave, the presiding official concluded that removal was too harsh a penalty and reversed the agency's action. The agency filed a petition for review, arguing that appellant had demonstrated an unwillingness to conform to rules of conduct and that appellant had been warned, after his first two offenses, that further offenses could lead to his removal. Further, the agency argued that determining the appropriate penalty was a discretionary agency power, outside the presiding official's scope of review.

The Board, applying *Douglas v. Veterans Administration*, MSPB Docket No. AT075299006 (April 10, 1981), to the case, explained that a purpose of the Board's review was to oversee the reasonableness of the penalty. The Board noted that, in some cases, the charges against the employee may be supported by evidence, but the penalty given for the charges may seem arbitrary and capricious, with no apparent connection between the offense and the interest served by the penalty. The Board outlined factors in determining an appropriate penalty, which included weighing the seriousness of the offense; determining whether the offense was intentional or inadvertent, malicious or for gain, or frequently repeated; referring to the employee's past work record and past disciplinary record; considering mitigating circumstances; and determining the potential for rehabilitation.

The Board, holding that the responsibility to follow agency rules was appellant's, determined that appellant showed intent to comply with rules for requesting leave, though the efforts he initiated to report his absence were unsuccessful. The Board found that the evidence did not indicate that appellant's record of absence had an adverse effect on agency operations or on appellant's fellow employees. The Board also found that although the record indicated that the agency attempted to rehabilitate appellant, the current charges against him were not deliberate violations of rules for which rehabilitation was necessary, but results of an unfortunate circumstance.

The Board concluded that although the charges against appellant, in conjunction with his similar past offenses, indicated the need for greater discipline, his actions did not warrant removal. Accordingly, the Board determined that a 60-day suspension was a reasonable maximum penalty and affirmed the initial decision as modified.

GEORGE SUMLARS v. U.S. POSTAL SERVICE

(Docket No. AT075209186)
August 23, 1982

1.120; 1.110; 9.130; 1.390; 1.511; 1.512; 1.410; 1.510

Charged with negligence in the performance of his duties, appellant was suspended during the notice period and removed from the position of transportation analyst. According to the record, the agency's action was based on appellant's improper preparation of Form 5429, "Certification of Exceptional Contract Service Performed." Appellant's misuse of the form resulted in crediting one highway contractor with 12 more mail deliveries than he had actually performed and thus overpaying that contractor $5,738.69.

When appellant appealed to the Board's regional office, the presiding official sustained the charge, and appellant subsequently filed a petition for review. The Board determined that the suspension imposed during the notice period was invalid. The Board found the agency's decision that retention of appellant in an active duty status during the notice period would not be in the "best interest of the public good morale, or, efficient service" to be unlawful, since in *Cuellar v. U.S. Postal Service*, MSPB Docket No. SF075299045 (November 13, 1981), it found that the crime provision of 5 U.S.C. §7513(b)(1) defines the only instance in which an emergency suspension during the notice period could be imposed.

In considering the events that led to the charges against appellant, the Board noted that had appellant used a particular supplementary form, which was for use at his discretion, his errors in over-crediting the contractor would have been found. Since the record indicated that appellant was the sole individual responsible for certifying the authorization of payments to the contractor in question, the Board found that the agency supported the charges against appellant by a preponderance of the evidence.

In discussing whether the charge against appellant was sufficiently serious to warrant his removal, the Board cited *Douglas v. Veterans Administration*, MSPB Docket No. AT075299006 (April 10, 1981) and noted that in determining the reasonableness of the penalty, factors such as the seriousness of the offense and appellant's past disciplinary and work records should be considered. The Board noted that the agency presented no evidence of previously taking disciplinary actions against appellant, and that until the incident in question, the agency apparently considered appellant's work to be satisfactory. However, the Board also found that appellant could easily have avoided the overpayment errors but instead cost the agency in excess of $5,000. Noting that appellant's position called for him to exercise significant independent discretion and that appellant's actions had a direct effect on the fiscal concerns of the agency, the Board determined that the penalty imposed in appellant's case was reasonable. Accordingly, the Board reversed the initial decision in part by ordering the agency to cancel the emergency suspension, and affirmed it in part.

CHARLES D. WATSON v. U.S. POSTAL SERVICE
(Docket No. SF07528010425)
August 12, 1982

1.110; 1.310; 1.313

Appellant was removed from the position of distribution clerk for three day's absence without leave (AWOL) and for tardiness on 14 occasions.

In the initial decision, the presiding official held, regarding the first charge, that the agency's refusal to grant appellant sick leave, because appellant failed to submit medical documentation to support his absence, was improper. Nonetheless, the presiding official found that the agency had sustained its charge of repeated tardiness and agreed that appellant's numerous attendance infractions justified his removal. Appellant petitioned for review of the initial decision.

The Board granted the petition for review, agreeing with the presiding official's finding that the agency failed to sustain the AWOL charge. However, the Board, applying *Webb v. U.S. Postal Service*, MSPB Docket No. SE7528010037 (March 18, 1982), found that since the agency—by way of PS Form 3971, "Request for, or Notification of, Absence"—approved leave for appellant's incidents of tardiness, such action precluded the agency's taking an adverse action against appellant for tardiness.

The Board pointed out that had the agency wished to discipline appellant for his tardiness, it should not have approved his requests for annual leave when he arrived at work late, but instead should have placed him in AWOL status. Therefore, the Board found the agency's contention that it never excused appellant's tardiness inconsistent with the fact that it approved leave for these occasions, and concluded that the presiding official erred in finding that the agency could properly charge appellant with tardiness when it had permitted him to use annual leave. Accordingly, the Board reversed the initial decision and ordered the agency to cancel appellant's removal.

REDUCTIONS IN FORCE

WILLIAM J. CRISP v. GOVERNMENT OF THE DISTRICT OF COLUMBIA (Docket No. DC03518110127)
August 30, 1982

4.320; 12.000000; 12.130; 12.400; 12.420

When appellant was separated from his position by reduction in force (RIF) action, he appealed to the Board's regional office, contending that he was erroneously reached by the RIF while off the agency's rolls. In the initial decision, the presiding official found that appellant had been restored to the agency's rolls and that the RIF was conducted lawfully. When the presiding official sustained the agency action, appellant petitioned for review.

In discussing the case, the Board noted that appellant was removed from the agency's rolls when the agency erroneously granted him optional retirement and then returned to the rolls when the Office of Personnel Management (OPM) determined that he failed to satisfy the minimum five years of civilian service required for optional retirement. Though the appellant alleged that he was never notified of his return to the agency's rolls and was therefore not subject to the RIF action, the Board found that appellant's retirement was erroneous, that he was never separated from the service and that he therefore remained an employee of the agency, subject to the RIF action. Though after learning of OPM's determination the agency neglected to inform appellant of his continued active duty status, the Board found that the agency's failure to do so did not affect appellant's employment status. The Board noted that appellant was entitled to back pay for the period of the invalid retirement.

Noting appellant's contention that after the record was closed, the presiding official accepted an agency personnel form as evidence of notice of appellant's restoration, the Board found that since the form merely amended a "Cancellation Retirement Action" and indicated appellant's entitlement to back pay for the period of his erroneous retirement, it was not material to appellant's case and did not affect the outcome of the case. Accordingly, the Board denied appellant's petition for review.

LOUIS G. PORTER v. DEPARTMENT OF COMMERCE (Docket No. DC03518110436)
August 30, 1982

10.130; 12.110; 12.111; 12.230; 12.421

When appellant's GS-13 engineering research psychologist position was abolished by reduction in force (RIF), he was offered a GS-9 research psychologist position. Consequently, he appealed to the Board's regional office, alleging that he was entitled to displace other employees who were also GS-13 engineering research psychologists but who were in lower subgroups.

In the initial decision, the presiding official reversed the agency's action, finding that the agency had failed to make appellant the best offer of assignment. The presiding official determined that appellant had the necessary education and experience to step into the jobs of several other employees without undue interruption to the activity. Further, he noted that finding that appellant had the skills and adaptability to perform the other jobs sufficiently "does not mean that appellant must perform the optimum quality and quantity of work for the position, even within the 90 days alluded to in the Federal Personnel Manual (Ch. 351-7)." Therefore, the presiding official reversed the agency's RIF action as it affected appellant, and the agency subsequently petitioned for review.

In considering the agency's petition, the Board explained that when an employee challenges an agency's RIF action and raises the issue of displacement rights, the agency has the burden of proving that it properly followed RIF regulations in that employee's case. In defense of its RIF action, the agency in this case discussed the "undue interruption" issue, arguing that the 90-day period in which an employee must obtain optimum quality and quantity does not apply to the assignment or displacement rights of the employee, but to the employee's release from competitive level.

Concerning the issue of "undue interruption," the Board quoted the Federal Personnel Manual which explains that although RIF actions often result in significant interruption of a work program, undue interruption does not simply mean mere inconvenience, but interruption to an extent that hinders the completion of timely and quality work. The Federal Personnel Manual further explains that undue interruption is directly related to the nature of the work program and that what would constitute undue interruption would vary for different programs, depending upon the priorities and pressures of each.

The Board noted that the agency's exhibits and testimony indicated that the agency did view the 90-day period as applying to both the establishment of the competitive levels and to the assignment rights. Therefore, the Board agreed with the presiding official's findings that the 90-day period concerning undue interruption was applicable to both rounds of competition and that appellant could perform the work of the other positions in question without undue interruption. Accordingly, the Board denied the petition for review and ordered the agency to comply with the initial decision.

RETIREMENT

JERUSHA Y. JACOBS v. OFFICE OF PERSONNEL MANAGEMENT and FAYE JACOBS, INTERVENOR

(Docket No. DA08318110546)
August 11, 1982

15.200; 15.240; 2.100; 2.120; 4.125

In this case, both appellant and the intervenor claim to be the surviving spouse of a deceased federal employee, and, as such, claim entitlement to civil service survivor annuity benefits. In May 1978, the intervenor was granted survivor annuity benefits by the Office of Personnel Management (OPM) and received them until April 1979 when appellant filed an application for benefits as the legal surviving spouse. OPM then terminated the intervenor's survivor annuity benefits pending the outcome of this appeal.

OPM had determined that because of the doctrines of laches and equitable estoppel, appellant could not assert a claim as legal surviving spouse. OPM found that appellant's move to take legal action to challenge the validity of her husband's later marriage after learning of that marriage was unreasonably delayed. OPM barred appellant from presenting evidence to contest the validity of the latest marriage because she had misled her husband to believe that they were divorced when they were actually only legally separated. Further, OPM found that because appellant failed to act during her deceased husband's lifetime, she denied him and the intervenor the opportunity to correct any defect in their marriage.

In the initial decision, the presiding official disagreed with OPM's finding concerning the doctrine of laches. The presiding official determined that appellant and her husband had equal access to knowledge concerning their marital status and that the intervenor presented insufficient evidence to show that the deceased believed himself to be divorced or that appellant instilled this incorrect belief in him. Therefore, the presiding official reversed the reconsideration decision of OPM and, subsequently, the intervenor filed a petition for review.

The Board, discussing how state laws affect survivor annuity benefits, explained that when competing claims are filed for these benefits, the law of the state with the most significant interest in determining the marital status is used to determine who is the legal surviving spouse. The Board noted that in this case, California, where the deceased married the intervenor, recognizes the validity of the latest marriage unless that validity is affected by a conclusive demonstration that no divorce was obtained in the first marriage. However, the Board further noted—as had OPM in its decision—that if a person claiming entitlement based on an earlier marriage delays unreasonably in taking action to protect her position as spouse, she may be barred from making a caim.

The Board found that according to the evidence of record, appellant and her husband lived apart for almost 30 years, that a judgment of separation was granted to appellant by default, and that when the deceased believed he was divorced, he married the intervenor and designated her his spouse and beneficiary for life insurance benefits, unpaid compensation, and survivor annuity benefits. Further, the Board noted that though appellant knew that the deceased presented the intervenor as his wife and that he had children in California, she never took action on these points.

The Board concluded that appellant's unreasonable delay in challenging the validity of her husband's later marriage barred her from claiming entitlement to a civil service retirement annuity as legal surviving spouse. Accordingly, the Board reversed the initial decision and sustained OPM's reconsideration decision, ordering OPM to grant the intervenor's application for civil service retirement survivor annuity.

OTHER AUGUST ISSUANCES:

THE FOLLOWING PETITIONS FOR REVIEW WERE DENIED:

ACOSTA, Benjamin and TORRES, Raymond R. v. Department of the Navy (Docket Nos. SF07528010477 and SF07528110020)
AJMANI, Monica v. Department of the Interior (Docket No. DC315H8210470)
ALLEN, Daniel v. Office of Personnel Management (Docket No. DC831L8010213ADD)
AYALA, Mary J. v. Department of Justice (Docket No. DA07528110336)
BANDA, Anita O. v. Office of Personnel Management (Docket No. DA831L8010272ADD)
BARBER, Barry W. v. Department of Transportation (Docket No. AT075282F0311)
BAROCAS, Abraham v. Defense Logistics Agency (Docket No. CH300A8110383)
BEAUDETTE, Steven v. Department of the Navy (Docket No. BN07528010017)
BELL, John S. v. Department of Health and Human Services (Docket No. PH07528110536)
BIGELOW, Arthur C. v. Office of Personnel Management (Docket No. DC831L8090010ADD)
BODE, Daniel P. v. Veterans Administration (Docket No. AT315H8110555)
BRENNER, Berthold v. Department of Health and Human Services (Docket No. DC03518210454)
BROWN, Derrick v. Department of the Navy (Docket No. PH07528111128)
BROWN, Robert P. v. U.S. Postal Service (Docket No. NY07528110362)
BURKHOLDER, Daphne L. v. Veterans Administration (Docket No. AT07528110759)
BUTTS, Wayne K. v. U.S. Postal Service (Docket No. DA07528110355)
CARLSON, Joseph v. U.S. Postal Service (Docket No. SE07528210100)
CARMICHAEL, Gloria v. Department of Health and Human Services (Docket No. PH315H8110318)
CIALEK, Francis E. v. Department of the Treasury (Docket No. BN315H110178)
CLICK, Dale v. Department of Health and Human Services (Docket No. PH03518110396)
COATES, Joceline v. Department of Health and Human Services (Docket No. PH531D8010360)
COOPER, Willie G. v. U.S. Postal Service (Docket No. DA07528210234)
CROFT, Iris v. Department of Health and Human Services (Docket No. DC03518210378)
CROUSE, Edward C. v. Office of Personnel Management (Docket No. DA831L8210254)
CURTIS, Costa G. v. Department of the Navy (Docket No. PH315H8210026)
DAVIS, Donald J. v. Department of the Air Force (Docket No. DE03518210074)
DELANEY, Walter v. Veterans Administration (Docket No. PH315H8110551)
DELOATCH, Willie T. v. Department of Agriculture (Docket No. DC34438210521)
DORNER, Blenda E. v. Office of Personnel Management (Docket No. AT08318110499)
DOZIER, Donald v. Department of Transportation (Docket No. DA075281F1783)
ELWERT, Charles v. Department of Education (Docket No. CH03518210009)
EVANS, Frederick Jr. v. Department of the Navy (Docket No. BN07528210051)
FALK, David E. v. Department of the Navy (Docket No. SF315H8210329)
FALZON, Charles L. v. Department of the Navy (Docket No. PH07528110613)
FERGUSON, Joseph V. v. U.S. Postal Service (Docket No. DA07528110370)
FLESCHUTE, Arthur L. v. Department of Justice (Docket No. DA07528110050)
FUQUAY, Leon N. v. Office of Personnel Management (Docket No. DA083109004)
GALLAGHER, Helen E. v. Defense Logistics Agency (Docket No. PH315H8210237)
GONZALES, Aurora L. v. Federal Aviation Administration (Docket No. DA03518010302)
GONZALEZ-RIOS, Melchor v. U.S. Postal Service (Docket No. NY07528110010)
GOODSTEIN, Joel B. v. Consumer Product Safety Commission (Docket No. NY03518210097)
GRAY, Fulton v. Office of Personnel Management (Docket No. AT08318110687)
GREEN, Ethel v. Department of Agriculture (Docket No. AT03518210221)
GREEN, Robert III v. U.S. Postal Service (Docket No. PH07528110320)
GREEN, Sidney L. v. Department of Labor (Docket No. PH07528110454)
GRIFFIN, James M. et al. v. U.S. Postal Service (Docket No. AT07528110416)
GRONBECK, Romer v. Department of the Interior (Docket No. SL07528110139)
GUILLEN, Frank A. v. Department of the Air Force (Docket No. DA07528110189)
HAGER, Estella v. Department of the Army (Docket No. PH07528110304)
HANCE, Carl E. v. Department of Transportation (Docket No. DA075281F0881)
HENNING, Richard K. v. Government of the District of Columbia (Docket No. DC035118110021)

HENRY, Isaac v. U.S. Postal Service (Docket No. NY07528110361)
HISE, William C. v. Office of Personnel Management (Docket No. DC34438210581)
HLISTER, Robert B. v. Department of the Navy (Docket No. BN07528110132)
HOLMES, Gregg E. v. Department of Transportation (Docket No. DA075282F0024)
HOYT, Thomas v. Department of the Navy (Docket No. BN315H8110103)
HRCHEK, Dolly v. Office of Personnel Management (Docket No. CH831L8010200)
HUGHES, William C. v. Department of Labor (Docket No. SL07528110115)
HUSSEIN, Saddigah M. v. U.S. Postal Service (Docket No. CH07528210141)
JOHNSON, Hertha v. Office of Personnel Management (Docket No. SF831L8110441)
KLETCHKA, Mary E. v. Department of Health and Human Services (Docket No. SL315H8110205)
KOZAR, Robert J. v. Department of Labor (Docket No. CH07528210093)
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INDEX

NOTES ON KEY NUMBERS

In each issue, summarized Board orders are indexed according to the key number system used in the published volumes, *Decisions of the United States Merit Systems Protection Board*. The index numbers listed after each caption show the subjects found in the decision. In the published volumes, the indexes will include citations of the decisions under the same numbers allotted to them here. There are 18 main subject areas. These are described under Major Topics and Scope Notes. The Outline of Topics divides each major topic into more specific subtopics.

MAJOR TOPICS AND SCOPE NOTES

Topic

1.000000 ADVERSE ACTIONS

Certain personnel actions are designated as "adverse actions" under Chapter 75 of the Civil Service Reform Act of 1978. This topic references Board opinions relating to the substantive law governing those actions and distinguishes other personnel actions not designated as "adverse actions" under Chapter 75. This topic also encompasses cases involving Board consideration of penalties in adverse action cases including the mitigation of penalties. Board cases concerning procedures governing adverse actions are located under *Practice and Procedure (10.000000)*, and opinions relating to jurisdictional matters have been placed under *Jurisdiction (6.000000)*. Cases regarding remedies available to the Board in adverse action cases are located in *Remedies (14.000000)*.

2.000000 CONSTITUTIONALITY

This topic references opinions in which the Board has considered constitutional aspects of cases before it. Included are claims pursuant to specific constitutional provisions, as well as claims derived from constitutional provisions, such as the right to privacy. Constitutional claims relative to discrimination are in *Discrimination (3.000000)*.

3.000000 DISCRIMINATION

This topic refers to Board cases concerning the substantive law of prohibited discrimination pursuant to the Civil Service Reform Act of 1978. Also included are cases relating to affirmative action and disparate treatment of similarly situated employees. Questions of evidence, jurisdiction, practice and procedure, and remedial action in discrimination cases are referenced in *Evidence (4.000000)*, *Jurisdiction (6.000000)*, *Practice and Procedure (10.000000)*, and *Remedies (14.000000)*, respectively.

4.000000 EVIDENCE

This topic references cases dealing with substantive rules of evidence employed by the Board, as well as cases concerning the harmful error standard in the Act. The Board is bound by statutory burdens of proof, and cases referencing the Board's interpretation of such burdens are also included here.

5.000000 FREEDOM OF INFORMATION, PRIVACY, AND SUNSHINE ACTS

This topic references Board cases relating to the Freedom of Information, Privacy, and Sunshine Acts.

6.000000 JURISDICTION

This topic includes cases in which the Board has made specific reference to jurisdiction under the Civil Service Reform Act of 1978, as well as cases dealing with issues of justiciability. Since the jurisdiction of the Board differs with respect to certain entities, this topic includes cases dealing with jurisdictional questions particularly related to such entities. Included also are Board cases dealing with its enforcement power, which is a matter of continuing jurisdiction, and cases under the Act's savings provision. Jurisdiction over appeals related to retirement is covered under *Retirement (15.000000)*.

7.000000 LABOR-MANAGEMENT RELATIONS

This topic contains cases arising under Title VII of the Act, including collective bargaining issues and the rights of individual employees. Title VII grievance procedure cases brought before the Board are also located under this topic.

8.000000 PARTICULAR EMPLOYMENT CATEGORIES

The Civil Service Reform Act of 1978 has provisions specifically applicable to certain categories of employees. This topic references cases in which the special procedural and substantive law applicable to such employee categories were discussed by the Board, and in which such special provisions were ger-

mane to the resolution of the case. Included are cases dealing with the merit pay provisions of the Act and the Senior Executive Service.

9.000000 PERFORMANCE RELATED ACTIONS

This topic references cases dealing with performance related actions under Chapter 43 of the Act, including procedural rights and standards of proof under Chapter 43, where performance appraisal systems have been implemented. Also included are cases dealing with performance appraisal actions under Chapter 75, where Chapter 43 appraisal systems have not yet been implemented.

10.000000 PRACTICE AND PROCEDURE

This is the major topic referencing cases which set out the procedural rules for matters before the Board, its administrative law judges, and its presiding officials. Matters such as timeliness and technical filing rules are included here, as well as the concepts of former adjudication and representation of parties.

11.000000 PROHIBITED PERSONNEL PRACTICES

The Civil Service Reform Act of 1978 lists merit systems principles governing the Federal work force and defines prohibited personnel practices that may not be taken against Federal employees. This topic is limited to cases in which the Board has interpreted these provisions and related matters.

12.000000 REDUCTIONS IN FORCE

This topic refers to Board cases dealing with reductions in force, including agency justifications for taking such actions and the substantive and procedural rights of employees affected.

13.000000 REGULATION REVIEW

The Civil Service Reform Act of 1978 empowers the Board to review regulations promulgated by the Office of Personnel Management and implementing regulations of other agencies. This topic references Board opinions dealing with such regulation review.

14.000000 REMEDIES

This topic references Board cases dealing with the remedial powers of the Board.

15.000000 RETIREMENT

This topic refers to Board cases involving issues relating to the retirement of Federal employees.

16.000000 SPECIAL COUNSEL

This topic references Board cases relating to the Office of Special Counsel, including the prosecution of Hatch Act cases and violations of the Federal Employees Flexible and Compressed Work Schedule Act. The filing requisites for complaints before the Special Counsel are included here, while procedural requisites in Special Counsel cases before the Board are in *Practice and Procedure (10.000000).*

17.000000 SUITABILITY AND FITNESS FOR DUTY EXAMINATIONS

This topic references cases dealing with issues of suitability. Included also are cases involving fitness-for-duty examinations.

18.000000 EMPLOYMENT PRACTICES

This topic references cases concerning the substantive law governing employment practices and distinguishes employment restrictions that are not appealable employment practices.

OUTLINE OF TOPICS

(With Key Numbers)

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The DIGEST is a monthly publication containing summaries of Board orders and a list of other Board orders and issuances. It is available from the Superintendent of Documents on either a subscription or single issue basis. The price for a subscription is $14 per year; ($17.50 outside the United States). Single issues are also available at a price of $2.00 per issue; ($2.50 outside the United States). Please address subscription or purchase inquiries to: Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

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DEFINITIONS

These definitions are provided for clarification purposes only and are not intended to convey the sirict legal meaning of the term.

Deciding Official—the official who renders the agency's decision.

Regional Office—the Board office authorized to receive appeals from the area where the appellant's duty station was located when the agency action was taken; there are 11 MSPB regional offices.

Initial Decision—the regional office decision made by the presiding official in response to a petition for appeal. The initial decision becomes final in 35 days unless a petition for review is filed with the Board and granted. In that case, the Board's decision becomes the final decision. If the petition for review is denied, the initial decision becomes final five days after the issuance of the denial.

Petition for Appeal—the request filed with a Board regional office for review of an agency action.

Petition for Review—the request filed with the three-member Board in Washington, D.C., for review of an initial decision of a presiding official.

Presiding Official—any person designated by the Board to preside over any hearing or to make a decision on the record. The presiding official referred to in the DIGEST summaries is usually a Board regional office official designated by the Board to perform these duties.

Proposing Official—the agency official who initiates an action to be taken against an employee.

Addendum Decision—an addendum decision deals with attorney fees.

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UNITED STATES MERIT SYSTEMS PROTECTION BOARD

Washington, D.C. 20419

MS 1.11:

United States Merit Systems Protection Board

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CASE SUMMARIES

ADVERSE ACTIONS

THEODORE ADAMEK v. U.S. POSTAL SERVICE
(Docket No. NY07528110371)
September 3, 1982

1.390; 1.420; 1.513; 10.700

Appellant was removed from the position of distribution clerk for "failure to meet the essential requirements of his position." The agency's action in this case was based on appellant's past disciplinary record, specifically on two incidents of unauthorized absence, both of which resulted in appellant's suspension and the agency's postponement of his within-grade step increases.

In the initial decision, the presiding official sustained the agency's action, rejecting appellant's contention that the removal was discriminatory because of his handicap, drug abuse. Subsequently, appellant petitioned for review, alleging that the presiding official erred in sustaining the charge based solely on incidents for which he already had been disciplined.

Although the Board agreed with the presiding official's finding that appellant did not establish that he was subject to handicap discrimination, it found that the agency's action could not be sustained. The Board determined that since the appellant's removal was based solely on two incidents of misconduct for which he had previously been suspended, the agency could not combine the two previous offenses to formulate a new charge and take a more serious adverse action. The Board noted, however, that the agency could consider past actions in determining the severity of the penalty in any subsequent adverse action based on a different incident of misconduct. Accordingly, the Board affirmed the initial decision in part and reversed it in part, ordering the agency to cancel the removal.

WILLIAM A. BURNETT v. U.S. SOLDIERS' AND AIRMEN'S HOME (Docket Nos. DC07528110429 and DC07528110298)
September 17, 1982

1.110; 1.340; 1.346; 1.362; 1.368; 1.510; 1.512; 4.210; 6.400; 10.131; 14.700

Appellant, charged with making loans, was suspended then removed from the position of health care technician at the U.S. Soldiers' and Airmen's Home. The agency's action was based on its discovery that for a period of about a year, appellant cashed checks made out to him or to "cash" for a member of the home. According to the record, appellant first stated that they were repayments for loans, but later admitted that he had cashed them as a personal favor.

Appellant appealed to the Board's regional office, and the presiding official found that he had not made loans and had not, by cashing the checks, violated 5 C.F.R. part 735, as the agency had alleged. When the presiding official reversed appellant's emergency suspension and removal, the agency petitioned for review of the two initial decisions issued in appellant's case, and the Office of Personnel Management (OPM) intervened on the agency's behalf. In light of the charges against appellant, both agencies requested that the Board take a further look at the record. Subsequently, the Board reopened appellant's case on its own motion.

In considering the emergency suspension action taken against appellant, the Board agreed with the presiding official's reversal of the emergency suspension. Citing *Cuellar v. U.S. Postal Service*, MSPB Docket No. SF075299045 at 11 (November 13, 1981), the Board noted that the agency provided appellant less than 30 days notice for a suspension of more than 14 days and did not show "reasonable cause to believe [appellant] has committed a crime for which a sentence of imprisonment may be imposed."

The Board agreed with the presiding official's finding that appellant received no financial gain from his check cashing transactions and noted that illegal gain includes soliciting money or accepting a gratuity from a person who has interests that may be affected by an employee's performance of his job. However, the Board also agreed with the contention in OPM's intervenor brief that the presiding official did not address all charges against appellant. The Board noted that whether appellant used public office for his own gain, whether he adversely affected public confidence in the government, and whether he lacked trustworthiness also warranted attention. In considering these matters, the Board found insufficient evidence to support charges relating to undermining public confidence or displaying general untrustworthiness. However, the Board did determine that appellant's conduct was in violation of 5 C.F.R. §735.201a(a), which provides:

> An employee shall avoid any action, whether or not specifically prohibited by this subpart, which might result in, or *create the appearance of*: (a) using public office for private gain. (Emphasis added.)

Thus, the Board found that the circumstances of the transactions created the appearance of wrongdoing. Nonetheless, and considering the suspicious nature of appellant's actions and the questions left unanswered in the record, the Board stated it was not compelled to find that appellant took money from a member of the home. Therefore, the Board found the penalty of removal too harsh. Accordingly, it vacated the initial decision reversing the removal. It sustained a portion of the charge and mitigated the penalty of removal to a 30-day suspension. Also, the Board affirmed as modified the initial decision overturning the emergency suspension.

JOSEPH E. CAIN, JR. v. DEPARTMENT OF THE ARMY (Docket No. SF07528110815)
September 8, 1982

1.120; 1.3611; 1.400; 1.410; 4.121; 4.320; 10.121

Appellant was suspended from the position of education services officer for 60 days for sexual harassment of females. Despite appellant's allegation that the action against him was based on racial discrimination, the Board's presiding official found that appellant failed to establish a prima facie case of discrimination and that suspension was a reasonable penalty. Consequently, appellant petitioned for review.

The Board noted that in appellant's petition, he questioned the agency's approach in acting against him, claiming that the agency should have followed equal employment opportunity (EEO) procedures. The Board agreed with the agency's contention that an employee who feels discriminated against is not required to address the problem by contacting the EEO office. The Board noted that in appellant's case, the employee complaining about him pursued the problem with her personnel office. The Board added that when the agency elected to investigate appellant's alleged misconduct, the agency afforded appellant all considerations due him and correctly applied the appropriate regulations.

Upon considering appellant's argument that the penalty against him was severe and contrary to guidance given in the table of penalties, the Board noted that according to the table, the penalty for a charge of sexual harassment ranges from a suspension of one to 10 days to removal. Thus, the Board agreed with the presiding official's finding that in light of appellant's conduct and especially considering his position as supervisor, the 60-day suspension was reasonable. The Board also discussed appellant's objection to the ground rules for the testimony of one witness and his contention that he should have been able to present evidence regarding that witness' social life to show that his alleged conduct could not have affected her. The Board agreed with the presiding official that such evidence was not relevant to the charge of sexual harassment in the work place. Accordingly, the Board denied appellant's petition.

JOHN H. CURRY v. DEPARTMENT OF THE NAVY
(Docket No. SF07528110627)
September 21, 1982

1.131; 1.3611; 1.3612; 1.400; 2.310; 3.141; 3.144; 10.131; 11.134

Appellant was charged with discrimination against an employee because of sex and demoted from the position of machinist foreman to a nonsupervisory position. The charges against appellant stemmed from a conversation he had with a female employee who was not supervised by appellant but who was a member of the apprentice program. Appellant allegedly upset the female employee by making disparaging remarks about the place of women in the machine shop and in the apprentice program. When the Board's regional office sustained the agency's action demoting him, appellant filed a petition for review.

In his petition, appellant argued that the agency violated his right to free speech and that he did not violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et. seq*. On its own motion the Board reopened appellant's case. Upon further consideration of the issues, the Board determined that the presiding official erred in basing his conclusions on regulations concerning sexual harassment and in finding that appellant violated Title VII. The Board noted that harassment under Title VII concerns sexual advances and pointed out that appellant's remarks were not "sexual" but "sexist." After reviewing the existing case law, the Board concluded that in the absence of sexual harassment, several sexist remarks or a "pattern or practice" would be required to show violation of the regulations.

Citing *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981), the Board noted that sexual harassment not leading to denial of tangible employment benefits constitutes sex discrimination regarding the "terms, conditions, or privileges of employment." However, the Board also noted that according to *Bundy*, casual or isolated discriminatory remarks "such as a few ethnic or racial slurs, may not raise a cause of action."

Even though the Board disagreed with the presiding official's conclusion concerning Title VII, it held that appellant exhibited discriminatory behavior and that such conduct by a supervisory employee needed to be addressed by the agency. Thus, the Board sustained the agency's charge. In addressing appellant's contention that his rights were protected by the First Amendment, the Board explained that according to 5 U.S.C. §7513(a), an agency may take action against an employee only for such cause as will promote the efficiency of the service. Citing *Arnett v. Kennedy*, 416 U.S. 134, 161, *reh. denied*, 417 U.S. 977 (1974), the Board further noted that taking action against an employee to "promote the efficiency of the service" includes dismissal for speech as well as for other conduct and that such action against an employee may be taken in some situations without offending guarantees of the First Amendment.

The Board discussed the difference between an employee exercising his freedom to comment upon matters of public concern and an employee making comments subversive to order and discipline in the workplace. Noting that appellant, in a supervisory position, spoke in an intimidating manner and against management policies regarding equal opportunity employment, the Board deemed his remarks disruptive and without value as public comment. Determining that the penalty in appellant's case was reasonable, the Board affirmed the initial decision as modified, sustaining the demotion.

RICHARD A. FLORES v. DEPARTMENT OF LABOR
(Docket No. DA07528110503)
September 13, 1982

1.110; 1.332; 1.3611; 4.114; 4.115; 4.125; 4.127; 4.211; 8.531

Appellant was charged with sexually harassing a subordinate female employee and was removed from the position of regional administrator. According to the record, the agency's action was based on the charges that appellant raped an agency employee and threatened her with loss of job security if she told anyone what had transpired. When appellant appealed his removal, the presiding official found the agency's evidence insufficient to sustain the charges. The agency petitioned for review.

In the decision, the presiding official held that in the absence of physical or medical evidence, the reliability of the testimony of the allegedly raped employee was questionable. The presiding official found discrepancies in the employee's testimony regarding appellant's actions immediately following the alleged assault, the advice given her about seeking medical attention, and the conversation between the employee and her husband when she told him of the alleged assault. Moreover, the presiding official determined that when, in a subsequent encounter with appellant, the employee claimed that appellant was trying to kill her, she grossly exaggerated what had actually occurred and thus weakened her credibility as a witness. Also, the presiding official found that the results of a polygraph test administered to the employee were not of significant value.

The Board noted the agency's argument that the alleged victim had no reason to seek immediate medical attention, since she did not sustain injuries that required medical treatment. However, the Board agreed with the presiding official's determination that the agency's case suffered because it lacked competent medical evidence. The Board noted that medical evidence would have substantiated not only that the employee had been raped, but also would have documented her emotional state and any physical injuries such as bruises or torn tissue. Further, the Board concurred with the presiding official's finding that the results of the polygraph examination should not be afforded substantial weight. The Board found that the way in which the examination was conducted rendered the results questionable and noted that *Meier v. Department of Interior*, 3 MSPB 341, 346 (1980), describes criteria for administering such tests. The Board also noted that because the employee was hospitalized for "emotional stress" after the alleged assault, the type of polygraph equipment used and the results regarding whether the examiner detected symptoms of mental instability, the influence of drugs, behavioral indications of deception, or other attempts to "beat the machine" were pertinent to this case but not established in the record.

In discussing the employee's credibility, the Board noted that according to *Weaver v. Department of the Navy*, 2 MSPB 297, 299 (1980), due deference must be given to the assessment of the presiding official who was present to hear and observe the demeanor of witnesses. Determining that the agency's petition for review failed to show that the presiding official's findings regarding the employee's credibility were incorrect, and in the absence of physical or medical evidence or eyewitness testimony to strengthen the employee's allegations, the Board denied the petition for review.

GERALD P. GRAGG v. DEPARTMENT OF THE AIR FORCE (Docket No. DA07528010134)

September 16, 1982

1.363; 1.400; 1.600; 4.121; 7.200; 7.317; 7.318; 7.400; 14.700

Appellant was removed from the position of equipment cleaner for failing to obey an order that all employees who wear respirators be clean shaven. When the presiding official affirmed the agency's action, appellant filed a petition for review, contending that the agency committed an unfair labor practice. Specifically, appellant accused the agency of violating a negotiated policy which allowed employees who wear respirators to be "*trimmed* or clean shaven" and contended that the presiding official erred when he determined that labor-management issues were not relevant to the hearing and declined to accept appellant's evidence.

The Board, citing *Kuahine v. Department of the Navy*, 4 MSPB 408, in which it held that appellants may allege an unfair labor practice as an affirmative defense, determined that the presiding official erred in refusing to accept appellant's evidence. The Board therefore granted appellant's petition and further noted that according to *Crumpton v. Department of Health and Human Services*, AT07528010159 and *Stalkfleet v. U.S. Postal Service*, SL075209055, collective bargaining agreements have the same weight as agency regulations.

The Board discussed the agency's policy letters regarding shaving requirements, noting that the first policy letter, which required that employees who wore respirators be "trimmed or clean shaven" was followed by a second letter which required that employees be clean shaven. The Board also noted that the American Federation of Government Employees filed an unfair labor practice charge with the Federal Labor Relations Authority (FLRA) contending that the agency did not provide adequate notice so that the union could address the change in shaving requirements as expressed in the second letter. FLRA found that the agency committed an unfair labor practice and ordered it to revoke the second letter. The Board adopted FLRA's finding that the policy was invalid.

The Board discussed appellant's obligation to obey an order based on an invalid policy, stating that individuals may not disregard a law or rule because substantial question exists about the constitutionality or validity of that law or rule. The Board, noting that the agency's order to appellant to comply with the policy was issued before any ruling on the agency's ability to enforce the policy, determined that while appellant was seeking to change the policy, he was obligated to adhere to it.

Considering whether appellant's removal was an appropriate penalty for disobeying the agency's order, the Board noted that both the agency and appellant acted inappropriately—the agency in initiating a policy without notifying the labor organization and appellant in disregarding an employment requirement. The Board added that while sustaining the removal would be tantamount to endorsing the agency's failure to honor its bargaining obligation, reversing the removal would be unwarranted since appellant blatantly disobeyed a direct order and was fully advised as to what repercussions would result from his insubordinance. Seeking a balance between the need to preserve the collective bargaining obligation and management's right to discipline employees, the Board affirmed the decision as modified, ordering the agency to cancel appellant's removal and substitute a 30-day suspension.

CARL HYLTON v. FEDERAL AVIATION ADMINISTRATION (Docket No. DC07528110373)

September 21, 1982

1.110; 1.365; 1.368; 1.390; 1.400; 1.513; 4.212; 8.230

Appellant was removed from the position of supervisory police officer for improperly discharging his weapon. The charges against appellant arose when he, while on duty and in uniform, shot a man who was fleeing a bank; the man was suspected of forgery and of passing bad checks. When appellant appealed to the Board's regional office, the presiding official reversed the removal. Subsequently, the agency petitioned for review.

In its petition, the agency contended that the presiding official misinterpreted the agency's regulations governing the use of firearms by its airport police. In considering the contention, the Board noted that the agency's regulations explain that discharging a firearm at a person is justified only when certain criteria are met regarding whether a felony has been committed and whether the safety of others would be jeopardized by the officer discharging the weapon. Further, the Board noted that the agency's airport police training manual states that firing at a fleeing person is justified only in self defense or to protect an innocent person from harm. Determining that the presiding official did not properly consider appellant's conduct in light of the pertinent agency regulations, the Board found that appellant's actions were potentially dangerous to innocent bystanders when he discharged his gun first in the bank and then in the airport corridor. Further, the Board found that appellant's actions were not in self defense or necessary to protect someone else.

The Board did not agree with the presiding official's dismissal of the agency's contention that appellant's actions constituted negligence in his work performance and therefore considered that contention. The Board pointed out that although appellant claimed that he believed a robbery was in progress when he discharged his first shot, by the time he fired again, the suspect had fled the bank without using a weapon and appellant had learned that the suspect had not committed armed robbery. The Board further noted that at least one other person was in the corridor when the suspect fled and found that appellant's firing of his gun under such circumstances constituted careless work performance.

In determining whether the penalty was reasonable, the Board noted appellant's work record, including his lengthy experience and extensive training, but determined that, in light of the seriousness of appellant's conduct, the penalty of removal was appropriate. Accordingly, the Board reversed the initial decision, and sustained the removal.

SHIRLEY JONES v. GOVERNMENT PRINTING OFFICE (Docket No. DC07528110681)
September 27, 1982

1.3311; 1.3711; 1.511; 4.250

Appellant was indefinitely suspended from the position of bindery worker based on criminal charges that she stabbed her husband to death. According to the record, the agency took such action according to the provision in 5 U.S.C. §7513(b)(1) that an agency may dispense with the 30-day notice period before suspending an employee if "there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed." When the Board's presiding official upheld the agency's action, appellant petitioned for review, contending that the presiding official erred when she found that the agency properly based the indefinite suspension on an arrest without a finding of reasonable cause.

Agreeing with appellant's argument, the Board noted that according to *Martin v. Department of the Treasury*, MSPB Docket No. AT075209044 at 8 (June 1, 1982), a suspension is imposed for disciplinary reasons or for other reasons pending inquiry and that an agency's indefinite suspension of an employee pending the outcome of criminal charges is proper. However, the Board explained that *Martin* requires that suspensions imposed on short notice be based on a reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed. The Board determined that in appellant's case, the presiding official failed to determine whether the agency, at the time it initiated the suspension, had reasonable cause to believe that the criminal charges were true. Accordingly, the Board granted appellant's petition to determine whether the indefinite suspension was proper.

In discussing finding "reasonable cause," the Board pointed out that such a finding is synonymous with that of probable cause, which will support a grand jury indictment. The Board explained that while an indictment is sufficient to support an indefinite suspension, an arrest is insufficient unless its circumstances give rise to "reasonable cause." Further, the Board pointed out that such circumstances must have existed at the time the agency effected the suspension; the Board found no evidence to indicate such circumstances in appellant's case. Though the Board noted that the court documents of record indicated that appellant had been arrested and charged with homicide and that a preliminary hearing had been set, it found no evidence of a judicial determination of probable cause. However, the Board noted that at a preliminary hearing that occurred after the proposed suspension, a superior court judge found probable cause to believe that appellant had committed the crime charged and ordered appellant held for grand jury action. Based on this determination, the Board found that reasonable cause was established, despite the lack of an indictment.

Considering whether the suspension promoted the efficiency of the service, the Board agreed with the presiding official's determination that based on the media coverage and the concern of agency employees caused by appellant's alleged conduct, her continued presence in the workplace would adversely affect employee morale and the agency's reputation. Thus, the Board sustained the indefinite suspension and affirmed the initial decision as modified.

WILLIAM B. LIMBERT v. VETERANS ADMINISTRATION (Docket No. NY07528110149)
September 21, 1982

1.110; 1.365; 1.369; 1.400; 1.561; 1.562; 8.230; 14.700

Appellant was removed from the position of supervisory police officer for neglecting to secure an unloaded revolver. According to the record, because appellant had difficulty opening the security office safe, he placed the revolver, in a manila envelope, in the captain's desk drawer, then locked the captain's office and the outer office. Subsequently, the revolver was lost. The charges against appellant were also based on his failure to note in the operations journal his receipt of the revolver and the arrival of Capt. Franey (a member of the New York City Department of Corrections) to retrieve the weapon.

When appellant appealed his removal to the Board's regional office, the presiding official found that appellant's actions were not negligent, but reasonable under the circumstances. Moreover, the presiding official determined that no adverse consequences resulted from appellant's failure to make journal entries and no danger to hospital staff or patients resulted from the loss of the weapon. When the presiding official reversed the removal, the agency filed a petition for review, contending that the presiding official misinterpreted the requirement set forth in 5 U.S.C. §7513(a) that an agency may take action against an employee only "for such cause as will promote the efficiency of the service." Further, the agency argued that the connection between appellant's position as a police officer and his responsibility to secure a weapon properly was sufficient to warrant his removal.

Though the Board agreed that a "nexus" existed between appellant's position in security and the charges against him, it could not find that appellant's actions warranted his removal. Considering appellant's unsuccessful effort to open the safe, his decision to leave the revolver behind locked doors, and the limited access to the security office, the Board concluded that appellant acted prudently under the circumstances. Further, though the Board viewed appellant's failure to make appropriate journal entries as a serious infraction, it found such neglect insufficient basis for removal. Accordingly, the Board determined that a 15-day suspension was the maximum reasonable penalty to impose in appellant's case. Therefore, the Board affirmed the initial decision as modified and ordered the agency to cancel the removal and substitute a 15-day suspension.

SAMUEL OBERMAN v. U.S. POSTAL SERVICE (Docket No. NY075209139)
September 2, 1982

1.345; 1.512; 8.230; 10.114; 10.119; 10.1215; 10.122; 14.700

Appellant, charged with removing magazines from the Dead Letter Branch, was removed from the position of security police officer. In the initial decision, the presiding official sustained the agency's action. Subsequently, appellant filed a petition for review.

The Board discussed appellant's contention that the agency inhibited employees who were to testify on his behalf when it notified them that they were not to attend the hearing solely at the request of appellant's counsel, but to attend only at the request of the presiding official. The Board explained that, according to its procedures, the agency was not obligated to make its employees available for the hearing until their presence was ordered by the presiding official. Further, the Board noted that at the request of appellant's counsel, the presiding official did direct the agency to provide witnesses and that the presiding official and the agency assured the witnesses that they would suffer no reprisals for testifying on appellant's behalf. Thus, the Board found that appellant's defense was not prejudiced by the agency's conduct toward the witnesses.

The Board considered the reasonableness of the penalty imposed in appellant's case, noting that the presiding official did not have the guidance of *Douglas v. Veterans Administration*, MSPB Docket No. AT075299006 (April 10, 1981), in reaching her initial decision. The Board explained that according to *Douglas*, the agency should choose a penalty only after weighing all relevant factors and that in appellant's case, the seriousness of his offense, his type of employment and his past disciplinary and work records were among relevant factors for consideration. In determining whether the penalty was reasonable, the Board noted that contrary to agency rules, appellant intentionally removed from the Dead Letter Branch several magazines that were undeliverable and thus slated for destruction. The Board considered appellant's offense in light of his employment as a security police officer and determined that his misconduct in removing even magazines designated for disposal compromised his responsibility and integrity as a law enforcement official. However, the Board also noted appellant's clearly satisfactory service and disciplinary records and found that a 30-day suspension was the maximum reasonable penalty which could be imposed.

The Board noted that the agency suspended appellant during the advance notice period of the removal action and that appellant appealed the emergency suspension action to the Board's regional office, requesting that that appeal be held and consolidated with the removal appeal. The two appeals were not joined, and the emergency suspension action was not adjudicated in the initial decision regarding the removal action or in a separate initial decision. Therefore, the Board determined that the emergency suspension appeal should be remanded to the regional office for further development of the record and for a hearing, if requested. Accordingly, the Board affirmed as modified the decision regarding the removal action and remanded the emergency suspension appeal to the regional office for adjudication.

BENNY R. SATTERFIELD v. DEPARTMENT OF THE ARMY (Docket No. DA07528110426)
September 27, 1982

1.131; 1.390; 1.400; 1.561; 3.1311; 3.1321; 4.240; 6.126

Appellant was demoted from the position of welder because he was physically unable to perform the duties of the position. When the Board's regional office affirmed the agency's action, appellant petitioned for review, agreeing that he was unable to perform the duties of the welder position, but contending that he was not qualified for the lower-graded position of laborer in which he was placed. Further, appellant claimed that he was denied certain rights regarding disability retirement.

According to the record, appellant stated that because the agency physician restricted him from doing jobs involving excessive heat, he was not qualified for the laborer position, which involved such duties. Though, in the initial decision, the presiding official considered appellant's argument that during the summer he had to work in hot conditions outside or in rooms that were not air conditioned, she decided that if appellant were prohibited from working in the summer, that restriction would have been specifically stated rather than encompassed in the general restriction about working in "excessive heat." Therefore, the presiding official found that the "excessive heat" restriction did not preclude appellant from working in the laborer position during the summer and sustained the demotion; the Board agreed with this finding.

In considering the reasonableness of the penalty imposed in appellant's case, the Board noted appellant's contention that the agency should have proven by a preponderance of evidence that his demotion was appropriate. Citing *Douglas v. Veterans Administration*, MSPB Order No. AT075299006 at 19 (April 10, 1981), the Board noted that the "preponderance of evidence" standard does not apply to the agency decision itself, but to the factual considerations of a case and the conduct spurring the agency decision. Thus, the Board, stating that the agency was required only to establish that the demotion was reasonable under the circumstances, found that the agency demoted appellant to the best available position for which he was qualified.

The Board noted appellant's contention that he was denied certain disability retirement rights. Appellant specifically alleged that his demotion violated an agency regulation concerning the disposition of a proposed adverse action against an employee while that employee has an application for disability retirement in process. Appellant, who was awaiting a reconsideration of the decision the Office of Personnel Management (OPM) issued regarding his disability retirement application, argued that the agency's regulation required that his demotion be held in abeyance until OPM rendered its decision. The agency held that its regulation applied only to OPM's first decision. The Board, pointing out that the burden is on the appellant to prove that his construction of the agency regulation is correct, noted appellant's argument that since the first decision OPM renders is "initial," the decision that would be subject to the agency's regulation is the final or reconsideration decision. The Board, finding that OPM's initial decision could be final if no appeal of it were made, determined that appellant failed to show that his construction of the regulation was more correct than the agency's.

The Board also considered appellant's complaint that he was denied rights concerning disability retirement because he was not counseled about options other than demotion. Agreeing with the presiding official's finding that the issue in question was whether the agency followed proper procedures in reducing appellant in grade, not whether appellant was entitled to retire on disability, the Board denied appellant's petition for review.

ATTORNEY FEES

HOWARD G. MORGAN v. DEPARTMENT OF THE AIR FORCE (Docket No. SF07528090155ADD)
September 7, 1982

1.131; 1.562; 11.170; 14.520; 14.522; 14.540; 14.550

In initiating a corrective personnel action, the agency demoted appellant to his former position in order to place an employee who was allegedly discriminated against in appellant's position of roads and grounds maintenance foreman, WS-4756-6.

When appellant appealed to the Board's regional office, the presiding official reversed the demotion action, finding that the agency failed to show by a preponderance of the evidence that appellant's promotion to the WS-6 position was based on racial discrimination. However, the presiding official did not address appellant's contention that since the demotion was the agency's fault rather than appellant's, it was not for proper cause.

Appellant's counsel filed a motion for an award of attorney fees, the presiding official issued an addendum decision awarding them, and the agency petitioned for review of that decision. In considering the agency's petition, the Board found that the award of attorney fees was warranted because the action against appellant was "clearly without merit" under 5 U.S.C. Citing *Carter v. Department of the Army*, MSPB Docket No. AT07528110203 at 2 (May 18, 1982) and *Quinney v. Department of the Army*, 3 MSPB 123, 125 (1980), the Board pointed out that an agency may take an action against an employee "only for such cause as will promote the efficiency of the service" and that 5 U.S.C. §7513(a) does not authorize demotion of an employee to implement another employee's personnel action. The Board noted that the agency did not demote appellant because he performed inadequately in his WS-6 position, but because another employee also deserved the WS-6 position. Nonetheless, the Board noted that *Carter* obligated the agency to place both employees in positions without affecting either of them adversely.

Appellant responded to the agency's petition for review, requesting payment of an additional $450 for preparation of his response to the agency's petition. Noting that an attorney may be compensated for services regarding an agency's petition for review and for time spent working on a fee petition, the Board held that counsel may be compensated for services regarding an agency's petition for review of an addendum decision which awarded attorney fees to counsel. The Board found that counsel's charges for preparing appellant's response were reasonable. Accordingly, the Board affirmed the addendum decision as modified and ordered the agency to remit attorney fees to appellant's counsel.

GLENN H. SIMS v. DEPARTMENT OF THE NAVY
(Docket No. CH07528090020ADD)
September 28, 1982

14.510; 14.520; 14.525; 14.530; 14.560

Appellant petitioned for review of an addendum decision in which the presiding official held that he was not entitled to an award of attorney fees because the charges against him were sustained. According to the record, appellant was charged with fraudulent use of a government purchase document and misuse of government time.

In considering appellant's petition, the Board noted his contention that the presiding official erred in considering his request for fees under 5 U.S.C. §7701(g) rather than under the Back Pay Act (5 U.S.C. §5596). The Board pointed out that the Back Pay Act provides for employee entitlement to attorney fees "in accordance with standards established under §7701(g)." Further, the Board noted that the standard under §7701(g) requires that the employee show that such award is "warranted in the interest of justice." Agreeing with the presiding official's finding that appellant had not met the interest of justice standard, the Board found that appellant was also not entitled to an award under the Back Pay Act.

The Board also addressed appellant's contention that not being afforded the opportunity to reply to the agency's response to his request for attorney fees was a disadvantage to him. Noting that appellant had the opportunity to establish his entitlement to attorney fees when he filed his motion for fees, the Board stated that its regulations do not provide for such a rebuttal by an appellant, and thus held that appellant was not entitled to a second chance to offer information in support of his claim. Accordingly, the Board denied appellant's petition for review.

PERFORMANCE

JOAN WILLIAMS v. DEPARTMENT OF EDUCATION
(Docket No. PH531D8110327)
September 17, 1982

4.127; 4.211; 4.220; 9.320; 9.331; 9.332

When the Board's regional office reversed the agency's action denying appellant's within-grade increase, the agency petitioned for review, contending that appellant was not performing at an acceptable level of competence. Subsequently, the Board reopened the case on its own motion for further consideration in light of *Schramm v. Department of Health and Human Services*, No. 81-2144 (3rd Cir. June 28, 1982).

The Board explained that according to *Schramm*, determinations of acceptable level of competence pursuant to 5 U.S.C. §5335 and 5 C.F.R. part 531D, must be based upon the "preponderance of the evidence" standard as opposed to the substantial evidence standard. The Board determined that it will therefore apply the preponderance test in matters reviewable by the Third Circuit and the substantial evidence test in matters reviewable by all other jurisdictions.

Upon considering the record, the Board determined that substantial evidence existed to support the agency's denial of appellant's within-grade increase. The Board quoted its regulations concerning substantial evidence, which define such evidence as relevant evidence

> . . . which a reasonable mind, considering the record as a whole, might accept as adequate to support a conclusion that the matter asserted is true.

Citing *Parker v. Defense Logistics Agency*, 1 MSPB 498, 505-6 (1980), the Board compared what constitutes substantial evidence to what is required by the preponderance standard—"evidence that a reasonable person would accept as sufficient to find a contested fact more probably true than untrue."

In reaching its determination that the record contained sufficient evidence to uphold the agency's action, the Board considered two memoranda which concerned appellant not completing work in a timely manner, as the "most significant independent evidence of probative value in the record." The Board noted that in responding to these memoranda, appellant did not contest the allegations that she did not complete work on time. Therefore, the Board determined that adequate evidence existed from which a reasonable mind might conclude that appellant's performance as a supervisor was not wholly competent. However, based on the record, the Board could not find that a preponderance of the evidence supported such a conclusion about appellant's competence. Agreeing with the presiding official's determination that the burden to set forth a coherent and convincing case was the agency's, the Board found that the agency did not provide pertinent information regarding exactly what appellant's responsibilities were and how she failed to fulfill them. The Board pointed out that the agency failed to explain its procedures, to associate documents with aspects of the case, and to rebut appellant's arguments. Therefore, finding that it could not determine for certain that appellant was most likely not entitled to a within-grade increase, the Board affirmed as modified the initial decision and ordered the agency to cancel the denial of appellant's within-grade increase.

REDUCTIONS IN FORCE

WILLIAM L. BURBRIDGE v. GOVERNMENT OF THE DISTRICT OF COLUMBIA (Docket No. DC03518110150)
September 27, 1982

8.370; 12.114; 12.220

Appellant was separated from the position of supervisory youth assistance representative by reduction in force (RIF). Subsequently, he appealed to the Board's regional office, alleging that the agency restricted his competitive level by failing to include in it a nonsupervisory field technical assistant position. Stating that the duties of that position were similar to those he performed, appellant also contended that inclusion of that job would have prevented his release from his competitive level.

In the initial decision, the presiding official sustained the RIF action, finding that the agency conducted the RIF for a legitimate reason and that it properly relied on employee position descriptions in determining whether the positions could be included in the same competitive level. In considering appellant's petition for review, the Board noted that in *Callahan v. Environmental Protection Agency*, 3 MSPB 536, 537 (1980), it held that when an employee raises questions about a position to which he could have retreated, the burden is on the agency to address these questions by producing the position description for the job the employee had held or by presenting evidence of the duties the employee had actually performed. The Board noted that the agency produced both relevant position descriptions, and conceded that the two positions involved similar duties, but maintained that for the most part the positions were sufficiently dissimilar to justify placing them in separate competitive levels. The Board pointed out that appellant's job required development of program objectives and policies, while the other position in question required coordination and execution of these objections and policies, liaison with the public and private sector, and other nonsupervisory tasks. Finding that the agency established the propriety of two distinct competitive levels, the Board noted that appellant was required to rebut the agency's evidence, but he failed to present further pertinent evidence. Accordingly, the Board denied his petition.

HOWARD D. COWAN v. DEPARTMENT OF AGRICULTURE (Docket No. DA03518110165)
September 1, 1982

4.310; 6.126; 8.360

When appellant's position as an aviation safety inspector was abolished and he was separated by reduction in force (RIF) action, he appealed to the Board's regional office. In the initial decision, the presiding official found that although the agency had properly applied RIF regulations, it had, in appellant's case, misapplied one of its internal directives concerning appointments and transfers of U.S. citizens to foreign countries. The directive stated that after an employee returned to the U.S., the agency would try to place the employee in a position equal in grade to the position he held during his overseas tour or return the employee to his original position if the placement efforts failed. The presiding official found that the RIF terminated appellant's duty, that such action obligated the agency to place appellant in a position in the U.S., and that the agency erred in not complying with its own directive. Therefore, the presiding official reversed the agency's decision, and the agency petitioned for review.

In its petition for review, the agency alleged that the presiding official misinterpreted the directive, since the directive applied to employees in a continuing employment status, not to employees subject to a RIF action. The agency added that since the directive applied not to RIF actions but to employee placement after an overseas tour, interpreting the directive was not within the Board's jurisdiction.

In discussing appellant's case, the Board explained that 5 U.S.C. §7701(a) limits Board jurisdiction to actions which are made applicable by "any law, rule, or regulation." The Board noted that an agency's failure to comply with one of its own directives is not an appealable action and that appellant's case must be viewed as a matter concerning part 351 regulations, which govern RIF actions. Citing *Losure v. Interstate Commerce Commission*, 2 MSPB 361 (1980), the Board explained that certain issues are reviewable in a RIF appeal and that these include the issue of the employee's entitlement in a RIF situation. The Board noted that agencies can provide employees with RIF rights which exceed those found in part 351 but that in appellant's case, the directive in question did not provide for entitlements in a RIF action. The Board determined that the directive did not concern the RIF action and therefore was not within Board jurisdiction to review. Accordingly, the Board found that the presiding official erred in reversing the agency's action based on the directive and thus reversed the initial decision.

HERBERT E. FARMER v. DEPARTMENT OF TRANSPORTATION (Docket No. BN03518110114)
September 28, 1982

3.130; 10.112; 10.132; 10.1322; 12.300; 12.421; 12.530; 12.561

Appellant was separated from the position of patent advisor by reduction in force (RIF). When he appealed the agency's action to the Board's regional office, the presiding official affirmed the agency's action. Subsequently, appellant petitioned for review, contending that the agency did not show that a reorganization was the reason for the RIF action; that the agency separated him because he exercised his appeal rights and because he was handicapped; and that the presiding official's decision violated his transfer-of-function rights.

In considering the petition, the Board did not agree with appellant's claims that a reorganization was not the reason for the RIF action and that he was separated because of a court case he had pending. The Board pointed out that a preponderance of the evidence, including the testimony of agency officials and documents of record, sufficiently explained the RIF and reorganization. Further, the Board found no basis to disturb the presiding official's finding that the agency's action was motivated neither by appellant's pending law suit nor because of personal animosity towards him.

Citing *Copeland v. Department of the Army*, MSPB Docket No. AT03518010112 (January 4, 1982) and *Killingsworth v. Department of Health and Human Services*, MSPB Docket No. SF03518110645 (May 3, 1982), the Board discussed appellant's point that the RIF was questionable because he was the only person adversely affected by it. The Board noted that just because a reorganization adversely affects only one person does not mean that the reorganization is not bona fide. The Board determined that the agency's action—

abolishing two positions and combining their duties into one new position—clearly satisfied the definition of a reorganization.

In considering appellant's allegation of handicap discrimination, the Board noted appellant's complaint that the agency did not accommodate his heart condition and alleviate his job stress by locating his desk farther from the supervisor or by assigning him to another supervisor. However, the Board agreed with the presiding official that appellant failed to indicate how these accommodations would have affected the agency's action to abolish his position, and thus that he failed to show a causal connection between his alleged physical handicap and the initiation of the RIF action. Further, regarding appellant's argument that the agency violated his transfer-of-function rights by transferring his function—but not him—to another location, the Board found that appellant's failure to raise the issue before the presiding official precluded its consideration by the Board.

The Board also disagreed with appellant's contention that the agency violated regulations which require that the agency must include in its reply to a petition of appeal "a specific response to each allegation of appellant's petition admitting, denying or explaining each in whole or in part." Noting appellant's argument that the agency's failure to deny two of his allegations was an admission that the allegations were true, the Board pointed out that an agency admits an appellant's allegations by stating that they are admitted and that in appellant's case, the agency did not make such admissions in its response. Accordingly, the Board denied the petition for review.

RESTORATION TO DUTY

GEORGE C. PANIAGUA v. DEPARTMENT OF THE AIR FORCE (Docket No. DA03538110015)
September 16, 1982

8.400; 8.410; 12.430

Appellant was denied restoration to his former position because the agency determined that he did not qualify for restoration rights upon his release from military service. The agency claimed that appellant had been separated as part of a reduction in force (RIF) before entering military service and that he had received severance pay. The presiding official sustained the agency's denial, concluding that since appellant's enlistment was in the reserve, he did not enter active duty until he completed his civilian civil service and therefore did not have restoration rights under 30 U.S.C. §2024(a). Subsequently, appellant petitioned for review.

In considering the petition, the Board noted that while the record indicates that appellant was employed by the agency until June 13, 1976, when he was separated by a RIF action, appellant enlisted in the Army Reserve two days before the effective date of the RIF action. Further, the Board noted that appellant began active duty with the regular Army on June 25, 1976, served four years and then filed a timely request for restoration to his former position.

The Board agreed with appellant's contention that the agency was obligated to restore him to his former position in spite of the break between the time he left his federal job to enter military service and the actual date he began military duty. The Board agreed that the presiding official may have been correct in finding that appellant was not entitled to restoration under 38 U.S.C. §2024(a). However, it determined that appellant was entitled to such rights under 38 U.S.C. §2024(b)(1), since appellant entered active duty in response to special orders and served not more than four years active duty. The Board found that since appellant served four years of active duty in the regular Army according to orders issued before the effective date of the RIF, he was not precluded from restoration rights by his original enlistment in the reserve. Furthermore, the Board determined that appellant's separation by RIF rather than for entrance into active military duty did not affect his restoration rights.

The Board generally discussed an employee's right to restoration, stating that the intent of Congress in providing such rights was to insure that individuals returning to civilian life after service in the military would be able to resume their previous employment without any loss. The Board cited court cases—*Kelly v. Ford Instrument Co., Div. of Sperry Rand Corp.*, 298 F.2d 399, 404 (2d Cir. 1962) and *Hall v. Chicago & Eastern Illinois Railroad*, 240 F. Supp. 797, 800 (N.S. Ill. 1964)—which held that an employee who entered the military while laid off from his job was entitled to reinstatement after completion of his military service and that the employee's rights were not affected by his failure to reply to a recall notice sent to his last known address. The Board found that in appellant's case, his failure to respond to the agency's notices offering him the opportunity to return to work did not bar him from restoration rights. Moreover, the Board found that appellant's acceptance of severance pay was not an indication that he waived his restoration rights. Accordingly, the Board found appellant entitled to restoration to his former position or a similar position and ordered the agency to cancel its denial of appellant's request for restoration rights.

EDWARD J. WRIGHT v. U.S. POSTAL SERVICE
(Docket No. DC035381100009)
September 24, 1982

8.421

On the basis of misconduct which did not result in his dismissal, appellant was disqualified from restoration under 5 U.S.C. §8151(b)(2). The applicable regulations, which concern job retention rights for injured or disabled federal employees, direct the agency to make all reasonable efforts to place the employee either in his former position or an equivalent one if the employee has recovered from the injury or disability within more than one year after commencement of compensation.

After the Board's regional office sustained the agency's action on appellant's application, the Board vacated and remanded that decision for reconsideration in light of *Thompson v. U.S. Postal Service*, MSPB Docket No. DA035399002 (March 26, 1981). Upon reconsideration, the presiding official again sustained the agency's action and appellant petitioned for review.

The Board noted that according to the record, appellant was separated from his position because of an on-the-job injury and that, upon his full recovery, he applied for priority consideration for restoration to duty. Noting further that the agency based its denial of appellant's request on his disciplinary record, which included 14- and 30-day suspensions for absence without leave, the Board found that the agency's disqualification of appellant's application was improper. Citing *Raicovich v. U.S. Postal Service*, No. 81-1788, slip op. at 15 (D.C. Cir., April 16, 1982), the Board stated that for an agency to refuse to rehire a recovered former employee because of previous conduct for which he was not dismissed, was contrary to the purpose of §8151(b)(2).

Discussing the applicability of *Raicovich* to appellant's case, the Board noted that *Raicovich* explains that the 1974 amendments to the Federal Employees' Compensation Act were Congress' effort to compensate federal employees injured while on duty by affording them treatment equal to that which they would have received had they not been injured. Further, the Board noted that reinstatement rights under *Raicovich* provide that an employee in good standing at the time of his injury be placed on a priority employment list and be reemployed when an appropriate vacancy arises. The Board pointed out that according to *Raicovich*, if shortly before his injury the employee engaged in conduct which would have resulted in dismissal had the injury not occurred, the employee may be disqualified from restoration. However, in appellant's case, the Board determined that since appellant's misconduct did not warrant his removal, he was entitled to priority consideration for reemployment. Accordingly, the Board vacated the reconsidered initial decision and remanded the case to the regional office for issuance of a new decision reflecting the Board's findings. Further, the Board ordered the agency to submit to the regional office information regarding the availability of appropriate positions at the time of appellant's application for reinstatement.

OTHER SEPTEMBER ISSUANCES

PETITION FOR REVIEW DENIED:

ALEF, Allan Jay v. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms (Docket No. SE07528110188)

ALEXANDER, Ashton v. Veterans Administration (Docket No. DA07528110491)

ALLSBROOK, Joseph Jr. v. Department of the Navy (Docket No. PH07528010341ADD)

ANDREWS, Gerald v. Department of the Navy (Docket No. PH07528210029)

APUAN, Cesario S. v. Office of Personnel Management (Docket No. SF08318210399)

ATKINSON, Bettye J. v. Department of Commerce (Docket No. DC03518210221)

BANKO, Arthur J. v. Department of the Navy (Docket No. SE07528110075)

BROWN, David H. v. Government Printing Office (Docket No. DC0351801025)

BRUNING, Gerald v. U.S. Postal Service (Docket No. DE07528110207)

BUDESHEIM, Norma A. v. Federal Communications Commission (Docket No. DC07528010162)

BUTLER, Charles v. Department of Health and Human Services (Docket No. DC07528110527)

CASEY, Ronald v. U.S. Postal Service (Docket No. AT07528110490)

CATAU, John S. v. Department of Health and Human Services (Docket No. CH531D81110367)

CLAXTON, Donald B. v. Department of Justice, Bureau of Prisons (Docket No. SL03538010094)

COOPER, Doris I. v. Department of the Air Force (Docket No. DA531E8110086)

CRUZ, Natalio v. Department of the Air Force (Docket No. DA07528110321)

DE LA CRUZ, Victor v. Office of Personnel Management (Docket No. SF08318111874)

DE MILLAN, Florentina Rodriguez v. Office of Personnel Management (Docket No. SF08318110904)

DILLON, Lawrence v. Department of the Army (Docket No. DC531D8210018)

DRESSLER, Donald R. v. Department of the Army (Docket No. DC34438110438)

ECTOR, Charles F. v. U.S. Postal Service (Docket No. AT07528010190)

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ELIA, Sebastian A. v. U.S. Postal Service (Docket No. BN07528110152)

EVANS, Anne H. v. Department of Health and Human Services (Docket No. AT531D8110396)

FLEMING, Alma Jean v. Department of the Navy (Docket No. SE07528110210)

GALLEGOS, Albert J. v. U.S. Postal Service (Docket No. DE07528110143)

GANDY, Allen J. v. Department of Housing and Urban Development (Docket No. SF07528010397)

GATES, Charles M. v. U.S. Postal Service (Docket No. SL07528210150)

GIBSON-MEYERS, Claudia v. Veterans Administration (Docket No. SF07528110558ADD)

HENDERSON, John L. v. Department of the Treasury, U.S. Customs Service (Docket No. SE07528110115)

HORTON, Virginia v. Office of Personnel Management (Docket No. PH831L8010017)

ISAACSON, Ibert v. Department of Transportation, Federal Aviation Administration (Docket No. AT075282F0389)

JOHNSON, Donald v. Department of Transportation, Federal Aviation Administration (Docket No. CH075281F3389)

JOHNSON, Stephen E. v. Department of Agriculture, Federal Grain Inspection Service (Docket No. DA03518210251)

JOHNSON, Theodore v. Department of the Air Force (Docket No. SF07528010408)

JONES, Annie v. Government of the District of Columbia (Docket No. DC03518110078)

KENNEDY, Sandra v. Government of the District of Columbia (Docket No. DC03518010210)

KIDDER, Theodore v. Department of the Air Force (Docket No. SF07528111016)

KING, Pearl v. Internal Revenue Service (Docket No. NY07528110189)

KOKAT, Frank V. v. U.S. Postal Service (Docket No. SF07528110606)

KULIGOWSKI, Robert M. v. Small Business Administration (Docket No. NY315H8210053)

KRUEGER, Ray E. v. Office of Personnel Management (Docket No. DE08318110087)

LA ROSA, Victo E. v. U.S. Postal Service (Docket No. AT07528110474)

LAYSER, Earle F. v. Department of Agriculture (Docket No. DE07528110091)

LEAVY, Firt v. Defense Logistics Agency (Docket No. AT07528110303)

LEVINE, Bernard v. Department of Housing and Urban Development (Docket No. NY03518110360)

LEWIS, Anthony E. v. Department of Justice (Docket No. DC07528110521)

LEWIS, Lorie v. Government of the District of Columbia (Docket No. DC03518010349)

LO DOLCE, Timothy v. Department of Transportation (Docket No. SF07528210360)

MACK, Albert v. Defense Logistics Agency (Docket No. AT07528110304)

MARKS, Esther M. v. Department of the Air Force (Docket No. DA07528110348)

MARTINEZ, Fabian P. v. Office of Personnel Management (Docket No. SF08318111899)

MASUD, Enver v. Department of Energy (Docket No. DC300A8110336)

MAYBIN, Roger C. v. Government of the District of Columbia (Docket No. DC07528110439)

MORGAN, Kenneth v. Department of the Navy (Docket No. CH07528110441)

MOUTON, Calvin L. v. Department of Justice (Docket No. DA07528010092)

MURPHY, Phillip C. v. Department of the Treasury (Docket No. DC07528110493)

OPONSKI, Alexander J. v. U.S. Postal Service (Docket Nos. SL07528210002 and SL07528210111)

PERKINS, George C. H. Jr. v. Department of Transportation (Docket No. BN03518210066)

PORTER, Sandy v. Department of the Navy (Docket No. SF07527990089)

PRICE, Janet H. v. Tennessee Valley Authority (Docket No. AT03518110552)

REEDER, William R. v. Department of Housing and Urban Development (Docket No. AT04328010239)

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RIVERO, Manuel T. v. Office of Personnel Management (Docket No. SF831L8111034)

ROACH, Dann W. v. Department of the Air Force (Docket No. DA07528110195)

ROELOFSEN, Barend v. Department of the Army (Docket No. AT03518110145)

ROSENBERG, Elliot v. Commodity Futures Trading Commission (Docket No. NY531D8010048)

SARNER, Edwin v. Department of Justice, Immigration and Naturalization Service (Docket No. NY07528110206)

SELBY, Richard A. Jr. v. Department of the Air Force (Docket No. CH07528110403)

SHAIN, Roger H. v. U.S. Postal Service (Docket No. SF315H8210115)

SMITH, Barbara Ann v. Veterans Administration (Docket No. DC03518210459)

STINER, Roderick C. v. Department of the Army (Docket No. DC07528110873)

TAYLOR, Robert H. v. U.S. Postal Service (Docket No. AT07528110601)

THORNE, David J. v. Department of the Navy (Docket No. PH07528110006)

TRAGURA, Simplicio B. v. Office of Personnel Management (Docket No. SF08318010312)

TYLER, Richard L. v. Office of Personnel Management (Docket No. DC34438110525)

WHITING, Joseph R. v. Veterans Administration (Docket No. NY07528110420)

WRIGHT, Leroy Jr. v. Social Security Administration (Docket No. PH07528090140)

YATES, Jack v. Office of Personnel Management (Docket No. CH831L8210201)

YODER, Gilbert v. Department of the Air Force (Docket No. DC07528090063ADD)

ZENG, Walter A. v. Department of Labor (Docket No. CH07528210180)

PETITION FOR REVIEW DISMISSED:

BECKER, Richard v. Department of the Treasury (Docket No. NY34438110377)

KIRSCHNER, Edwin J. v. Office of Personnel Management (DC08318110139)

WATKINS, Gary M. v. Department of Labor (Docket No. PH03518210254)

INITIAL DECISION AFFIRMED OR AFFIRMED AS MODIFIED:

BATTAGLIA, James, v. Department of Health and Human Services (Docket No. NY531D8110090)

BRACE, Paul B. v. Department of Housing and Urban Development (Docket No. DC03518110379)

DOHERTY, Edward v. Department of Transportation (Docket No. NY07528110158)

DOWD, James B. Jr. v. Office of Personnel Management (Docket No. DC300A8110138)

GARIGAN, Mark O. v. Veterans Administration (Docket No. NY07528110267)

JACKSON, Floyd Jr. v. Department of the Treasury (Docket No. DC07528110193)

LAUDATO, James E. v. Office of Personnel Management (Docket No. SF831L8210366)

INITIAL DECISION AFFIRMED AS MODIFIED CONCERNING REMOVAL AND REVERSED CONCERNING EMERGENCY SUSPENSION:

RATLEY, Jackie R. v. Department of the Army (Docket No. AT07528110338)

INITIAL DECISION AFFIRMED CONCERNING THE DISMISSAL OF THE APPEAL AS UNTIMELY AND VACATED CONCERNING ITS DISCUSSION OF JURISDICTION:

CARMACK, Woodrow v. U.S. Postal Service (Docket No. SF07528110416)

PETITION FOR REVIEW GRANTED, INITIAL DECISION VACATED AND REDUCTION IN FORCE REVERSED:

Mc DERMOTT, Ellen v. Government of the District of Columbia (Docket No. DC03518010073)

INITIAL DECISION VACATED AND REMOVAL REVERSED:

MASON, Otis J. v. Soldiers' and Airmen's Home (Docket No. DC07528110508)

INITIAL DECISION VACATED AND SUSPENSION REVERSED:

KAMINSKY, Dorothy v. Department of Health and Human Services (Docket No. DC07528110709)

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CARTER, Jacqueline v. General Services Administration (Docket No. PH07528110256)

SIMMONS, Avegene L. v. Office of Personnel Management (Docket No. DC831L8010132)

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ACTING SPECIAL COUNSEL v. Department of Defense (Daniel A. De Carlo) (Docket No. HQ12088210049)

SPECIAL COUNSEL v. Alfred W. Halx (Docket No. HQ120600028)

ADDENDUM DECISION VACATED:

DICKEY, Marian L. v. Office of Personnel Management (Docket No. DC831L8110215ADD)

GREER, Charles B. v. Office of Personnel Management (Docket No. PH831L8110208)

MOORE, Carol J. v. Office of Personnel Management (Docket No. DE831L8010169ADD)

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GOODE, James T. v. Office of Personnel Management (Docket No. CH831L8110445ADD)

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FOWLER, Robert D. v. Department of Transportation (Docket No. DA07528210273)

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The petition of the Senior Executive Association regarding furloughing career appointees in the Senior Executive Service.

INDEX

NOTES ON KEY NUMBERS

Summarized Board orders are indexed according to the key number system used in the published volumes, *Decisions of the United States Merit Systems Protection Board.* The index numbers listed after each caption show the subjects found in the decision. In the published volumes, the indexes will include citations of the decisions under the same numbers allotted to them here. There are 18 main subject areas. These are described under Major Topics and Scope Notes. The Outline of Topics divides each major topic into more specific subtopics.

MAJOR TOPICS AND SCOPE NOTES

Topic

1.000000 ADVERSE ACTIONS

Certain personnel actions are designated as "adverse actions" under Chapter 75 of the Civil Service Reform Act of 1978. This topic references Board opinions relating to the substantive law governing those actions and distinguishes other personnel actions not designated as "adverse actions" under Chapter 75. This topic also encompasses cases involving Board consideration of penalties in adverse action cases including the mitigation of penalties. Board cases concerning procedures governing adverse actions are located under *Practice and Procedure (10.000000)*, and opinions relating to jurisdictional matters have been placed under *Jurisdiction (6.000000)*. Cases regarding remedies available to the Board in adverse action cases are located in *Remedies (14.000000)*.

2.000000 CONSTITUTIONALITY

This topic references opinions in which the Board has considered constitutional aspects of cases before it. Included are claims pursuant to specific constitutional provisions, as well as claims derived from constitutional provisions, such as the right to privacy. Constitutional claims relative to discrimination are in *Discrimination (3.000000)*.

3.000000 DISCRIMINATION

This topic refers to Board cases concerning the substantive law of prohibited discrimination pursuant to the Civil Service Reform Act of 1978. Also included are cases relating to affirmative action and disparate treatment of similarly situated employees. Questions of evidence, jurisdiction, practice and procedure, and remedial action in discrimination cases are referenced in *Evidence (4.000000)*, *Jurisdiction (6.000000)*, *Practice and Procedure (10.000000)*, and *Remedies (14.000000)*, respectively.

4.000000 EVIDENCE

This topic references cases dealing with substantive rules of evidence employed by the Board, as well as cases concerning the harmful error standard in the Act. The Board is bound by statutory burdens of proof, and cases referencing the Board's interpretation of such burdens are also included here.

5.000000 FREEDOM OF INFORMATION, PRIVACY, AND SUNSHINE ACTS

This topic references Board cases relating to the Freedom of Information, Privacy, and Sunshine Acts.

6.000000 JURISDICTION

This topic includes cases in which the Board has made specific reference to jurisdiction under the Civil Service Reform Act of 1978, as well as cases dealing with issues of justiciability. Since the jurisdiction of the Board differs with respect to certain entities, this topic includes cases dealing with jurisdictional questions particularly related to such entities. Included also are Board cases dealing with its enforcement power, which is a matter of continuing jurisdiction, and cases under the Act's savings provision. Jurisdiction over appeals related to retirement is covered under *Retirement (15.000000)*.

7.000000 LABOR-MANAGEMENT RELATIONS

This topic contains cases arising under Title VII of the Act, including collective bargaining issues and the rights of individual employees. Title VII grievance procedure cases brought before the Board are also located under this topic.

8.000000 PARTICULAR EMPLOYMENT CATEGORIES

The Civil Service Reform Act of 1978 has provisions specifically applicable to certain categories of employees. This topic references cases in which the special procedural and substantive law applicable to such employee categories were discussed by the Board, and in which such special provisions were ger-

mane to the resolution of the case. Included are cases dealing with the merit pay provisions of the Act and the Senior Executive Service.

9.000000 PERFORMANCE RELATED ACTIONS
This topic references cases dealing with performance related actions under Chapter 43 of the Act, including procedural rights and standards of proof under Chapter 43, where performance appraisal systems have been implemented. Also included are cases dealing with performance appraisal actions under Chapter 75, where Chapter 43 appraisal systems have not yet been implemented.

10.000000 PRACTICE AND PROCEDURE
This is the major topic referencing cases which set out the procedural rules for matters before the Board, its administrative law judges, and its presiding officials. Matters such as timeliness and technical filing rules are included here, as well as the concepts of former adjudication and representation of parties.

11.000000 PROHIBITED PERSONNEL PRACTICES
The Civil Service Reform Act of 1978 lists merit systems principles governing the Federal work force and defines prohibited personnel practices that may not be taken against Federal employees. This topic is limited to cases in which the Board has interpreted these provisions and related matters.

12.000000 REDUCTIONS IN FORCE
This topic refers to Board cases dealing with reductions in force, including agency justifications for taking such actions and the substantive and procedural rights of employees affected.

13.000000 REGULATION REVIEW
The Civil Service Reform Act of 1978 empowers the Board to review regulations promulgated by the Office of Personnel Management and implementing regulations of other agencies. This topic references Board opinions dealing with such regulation review.

14.000000 REMEDIES
This topic references Board cases dealing with the remedial powers of the Board.

15.000000 RETIREMENT
This topic refers to Board cases involving issues relating to the retirement of Federal employees.

16.000000 SPECIAL COUNSEL
This topic references Board cases relating to the Office of Special Counsel, including the prosecution of Hatch Act cases and violations of the Federal Employees Flexible and Compressed Work Schedules Act. The filing requisites for complaints before the Special Counsel are included here, while procedural requisites in Special Counsel cases before the Board are in *Practice and Procedure* (10.000000).

17.000000 SUITABILITY AND FITNESS FOR DUTY EXAMINATIONS
This topic references cases dealing with issues of suitability. Included also are cases involving fitness-for-duty examinations.

18.000000 EMPLOYMENT PRACTICES
This topic references cases concerning the substantive law governing employment practices and distinguishes employment restrictions that are not appealable employment practices.

OUTLINE OF TOPICS
(With Key Numbers)

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FOR YOUR INFORMATION

DIGEST

The DIGEST is a monthly publication containing summaries of Board orders and a list of other Board orders and issuances. It is available from the Superintendent of Documents on either a subscription or single issue basis. The price for a subscription is $14 per year; ($17.50 outside the United States). Single issues are also available at a price of $2.00 per issue; ($2.50 outside the United States). Please address subscription or purchase inquiries to: Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

INITIAL DECISIONS

Initial decisions made in the regional offices are available on microfiche. The microfiche and its indexes may be viewed in the library at the Board's central office. To subscribe to the microfiche "Federal Employee Appeals Decisions" at $150 per year for microfiche and index, contact the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

PUBLISHED BOARD DECISIONS AND INDEX

Decisions of the United States Merit Systems Protection Board (Volumes 1 and 2) and *Index to Decisions of the United States Merit Systems Protection Board* are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402 at $30 for the three-volume set; Stock No. 062-000-00002-3. Covering the period of January 11, 1979 through July 22, 1980, these volumes consist of final actions taken by the Board after the issuance of an initial decision in an appeal from an agency action, Board actions in cases where it has original jurisdiction, and precedential interlocutory actions. In most cases, the preceding initial or recommended decision is included. The cases are indexed in the accompanying multi-part index volume.

Volumes 3 and 4 (including multi-part index) are available from the Superintendent of Documents at $24 for the two-volume set; Stock No. 062-000-00009-1. These volumes consist of Board final actions taken under the appellate and original jurisdiction conferred by the Civil Service Reform Act of 1978, and precedential interlocutory actions from July 23, 1980 through December 31, 1980.

BOARD ORDERS

All Board orders, opinions, and indexes may be viewed in the Legal Publications Division, Office of the Secretary. Copies of individual decisions may be obtained by sending a written request to the Office of the Secretary, Legal Publications Division, Suite 1404, 5205 Leesburg Pike, Falls Church, VA 22041. Requests should include appellant's name, docket number, and date of the decision.

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DEFINITIONS

These definitions are provided for clarification purposes only and are not intended to convey the strict legal meaning of the term.

Deciding Official—the official who renders the agency's decision.

Regional Office—the Board office authorized to receive appeals from the area where the appellant's duty station was located when the agency action was taken; there are 11 MSPB regional offices.

Initial Decision—the regional office decision made by the presiding official in response to a petition for appeal. The initial decision becomes final in 35 days unless a petition for review is filed with the Board and granted. In that case, the Board's decision becomes the final decision. If the petition for review is denied, the initial decision becomes final five days after the issuance of the denial.

Petition for Appeal—the request filed with a Board regional office for review of an agency action.

Petition for Review—the request filed with the three-member Board in Washington, D.C., for review of an initial decision of a presiding official.

Presiding Official—any person designated by the Board to preside over any hearing or to make a decision on the record. The presiding official referred to in the DIGEST summaries is usually a Board regional office official designated by the Board to perform these duties.

Proposing Official—the agency official who initiates an action to be taken against an employee.

Addendum Decision—an addendum decision deals with attorney fees.

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DIGEST

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UNITED STATES MERIT SYSTEMS PROTECTION BOARD

Washington, D.C. 20419

MS1.11:

United States Merit Systems Protection Board

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PREPARED BY: Office of the Secretary, Legal Publications Division
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ADVERSE ACTIONS

WILBERT ALLEN v. DEPARTMENT OF THE NAVY
(Docket No. PH07528010081ADD)
October 25, 1982

6.520; 7.310; 14.110

Appellant, charged with threatening his supervisor with physical harm, was removed from the position of welder. When appellant appealed to the Board's regional office, the presiding official found that the agency's action indicated anti-union animosity, a prohibited personnel practice. Consequently, the presiding official required that the agency "retroactively reinstate the appellant to his former grade with back pay and all benefits . . . ."

The agency provided the regional office with evidence that it had cancelled appellant's removal, that appellant had received back pay, and that pay shift differential was being calculated. However, appellant subsequently petitioned the regional office, claiming that the agency had not properly complied with the initial decision. Specifically, appellant alleged that he was not restored to the night shift he had been working before his removal and that the agency did not give him back pay for the night shift differential or for the overtime he would have worked had he not been removed. The presiding official issued an addendum decision ordering the agency to assign appellant to his previous shift and workplace. As a result, appellant filed a petition for review questioning the presiding official's denial of back pay for the shift differential, and the agency filed a petition for review contending that it had fully complied with orders to restore appellant.

The Board discussed its compliance regulations, explaining that although complaints about compliance in a given case are properly referred to the regional office which issued the initial decision, back pay issues should be resolved between the employee and the agency. However, the Board added that if an employee cannot resolve such an issue with the agency, the matter should be brought before the General Accounting Office. Thus, the Board found the holding in the addendum decision implying jurisdiction to consider back pay matters overly broad.

The Board noted that under 5 U.S.C. §1205(a), it has the authority to order an agency to cancel a personnel action. The Board further noted that regarding an improper personnel action, the Federal Personnel Manual provides only that the employee being restored may be placed in a vacant position equal in grade and pay to that from which he was separated. The Board pointed out that when the agency restored appellant to a welder position on the day shift rather than the night shift, he suffered no change in grade, reduction in base pay, or loss of tenure or seniority rights. Addressing appellant's argument that he was entitled to back pay for the shift differential, the Board cited *Spinks v. U.S. Postal Service,* 621 F. 2d 987, 989 (9th Cir. 1980), in which the circuit court held that base pay did not include pay differential for working the night shift. The Board also noted the agency's assertion that appellant's specific welding skills had not been required on the night shift since appellant's reinstatement and pointed out that the record indicated that the original conditions of appellant's employment included the possibility of his assignment to day, night or shift work. Accordingly, the Board determined that the addendum decision ordering that appellant be assigned to the night shift interfered with the agency's management functions and its ability to allocate work. Therefore, the Board vacated the addendum decision, finding that the agency had properly restored appellant and that no further compliance was necessary.

CHARLES A. DEMSHOK v. DEFENSE MAPPING AGENCY (Docket No. BN07528110186)
October 15, 1982

6.125; 8.321; 8.3211; 8.3212

Appellant was terminated from the position of cartographer because he did not successfully complete his probationary period. Appellant appealed the agency's action to the Board's regional office, arguing that he had already completed the probationary period when he was terminated. Specifically, appellant contended that in computing his one-year probationary period as a cartographer, the agency should have included the probationary time he had served in a previous position.

In the initial decision, the presiding official agreed with appellant, finding that the agency selected him for the cartographer position noncompetitively by transfer. Moreover, the presiding official, relying on the agency's August 19, 1980 letter confirming appellant's selection and transfer, found no indication that appellant was required to complete a new probationary period as a condition of employment. Therefore, finding that the agency had not followed adverse action procedures under 5 U.S.C. §7512, the presiding official reversed the agency's action. Consequently, the agency petitioned for review and the Office of Personnel Management (OPM) intervened on the agency's behalf.

In its petition, the agency argued that the August 19 letter used the word "transfer" to mean that appellant would assume the cartographer position without a break in service. Further, OPM argued that a certificate of eligibles included in the record and bearing appellant's name was evidence that appellant was selected from such certificate rather than transferred. Citing *Oulvey v. Veterans Administration,* MSPB Docket No. SL07528010038 at 3 (July 29, 1981)—which discussed Federal Personnel Manual (FPM) Ch. 315, Subch. 8, para. 8-2—the Board agreed with these contentions. The Board explained that the pertinent chapter in FPM provides that an employee selected from a certificate of eligibles

> . . . is required to serve a probationary period of one year. This applies not only to the first appointment of this kind, but to any subsequent career or career-conditional appointment by selection from a certificate of eligibles, regardless of whether the appointee had previously completed a probationary period.

The Board disagreed with the presiding official's conclusion that appellant was noncompetitively appointed by transfer. Rather, the Board found that appellant was selected from a certificate of eligibles, was subject to a new one-year probationary period, and thus was a probationary employee when terminated. Further, the Board noted that probationary employees terminated for post-appointment reasons may appeal to the Board only if their terminations were based upon partisan politics or marital status discrimination. The Board determined that because appellant alleged no such basis for his termination, his appeal was not within Board jurisdiction. Therefore, the Board vacated the initial decision and dismissed the appeal for lack of jurisdiction.

HERBERT P. EDWARDS v. U.S. POSTAL SERVICE

(Docket No. DC07528010249)
October 15, 1982

1.321; 1.420; 3.1321

Appellant was removed from the position of mail handler for being physically unfit to perform his duties on June 3, 1980 and because of his previous disciplinary record. According to the record, the agency alleged that appellant had been drinking on the day in question. Finding that in choosing a penalty, the agency's consideration of appellant's past disciplinary record was proper and that the agency had tried to assist appellant as required by pertinent alcohol and drug abuse regulations, the presiding official sustained the removal. Appellant filed a petition for review.

In considering appellant's allegation that his past record should not have been considered, the Board pointed out that according to *Howard v. Department of the Army*, MSPB Docket No. PH075209128 (May 15, 1981), the Board will consider previous disciplinary actions if the employee has been given the entitlement to a full review of those actions, or "due process." On the other hand, the Board noted that *Bolling v. Department of the Air Force*, MSPB Docket No. NY07528090034 at 5 (December 28, 1981) provides that an agency may not "utilize clearly erroneous prior actions as aggravating factors so as to enhance the penalt[y] imposed." Noting that the evidence indicated that five of the disciplinary actions against appellant were based upon approved emergency annual leave or approved sick leave, the Board dismissed those five disciplinary actions from the consideration of appellant's past record. Citing *Cade v. U.S. Postal Service,* MSPB Docket No. SF07528010370 at 5 (November 24, 1981), the Board explained that a previous disciplinary record based on approved leave may not be treated as a disciplinary record warranting an enhanced penalty.

Finding that appellant's record showed a poor attendance history for at least the four years before his removal, and that appellant's job required that he be unimpaired and able to operate equipment safely and make deliveries, the Board decided that appellant committed a serious offense by his misconduct and damaged the trust his supervisor placed in him. Further, though the Board considered appellant's length of service favorably, it determined that appellant's 16 years at the agency were offset by his considerable record of unreliability. Accordingly, the Board affirmed the initial decision as modified and sustained appellant's removal.

ELMER B. HALL v. U.S. POSTAL SERVICE (Docket No. SF07527990020)
October 15, 1982

3.140; 10.121; 10.1213

Appellant was removed from his position for failure to pass the scheme examination. Although appellant appealed his case to the Board's regional office, and the presiding official affirmed the agency's action, the presiding official failed to consider appellant's allegation of discrimination. Therefore, the Board remanded the case to the regional office for consideration of that issue.

Appellant alleged that he failed the scheme examination because of sex discrimination, specifically because the agency routinely gave males the more physically demanding assignments and females the less demanding ones. Further, appellant contended that because the females performed the less strenuous job of sorting mail by hand, they increased their experience in eye-hand coordination and thus gained the split-second recognition necessary for passing the scheme test.

Appellant informed the presiding official that certain documents available from the agency, including specific lists regarding employee names and seniority rankings and a computer printout of daily work assignments would prove his allegation of discrimination. Also, appellant indicated that he did not want a hearing. Though the presiding official forwarded appellant's representations to the agency, he did not order the agency to furnish the documents mentioned by appellant. In his decision, the presiding official found that appellant had not provided evidence in support of his allegation of discrimination, and that appellant's removal was taken for such cause as would promote the efficiency of the service. Subsequently, appellant petitioned for review.

The Board considered appellant's argument that due process was denied him when the presiding official failed to request from the agency the information he had mentioned. Citing *Rosenberg v. Commodity Futures Trading Commission,* MSPB Docket No. NY531D8010048 (August 31, 1981) and *Lewis v. U.S. Marine Corps,* 3 MSPB 411 (1980), the Board pointed out that when an initial decision is issued without a hearing, the presiding official must, in the interest of justice, closely monitor what is submitted and request additional information, if appropriate. The Board determined that several factors—including the agency's failure to supply the requested evidence, appellant's waiver of his right to a hearing, and appellant's claim that the agency's inaction served to deny him due process—made further delving into appellant's case necessary. Finding that the evidence in question was material to establish appellant's allegation of discrimination or, on the other hand, to establish that appellant's removal was legitimate and non-discriminatory, the Board remanded appellant's case to the regional office for further proceedings, including the review of the evidence appellant requested.

JAMES W. JOHNSON v. DEPARTMENT OF THE TREASURY (Docket No. DC07528110080)
October 6, 1982

4.320; 10.12112; 10.1212; 10.1215

Appellant was removed from the position of plate printer for 61 days of absence without leave. Appellant appealed the agency's action to the Board's regional office, and the regional office made three separate attempts to schedule a hearing as requested by appellant. When the hearing was convened, neither appellant nor his attorney appeared or contacted the presiding official about their failure to appear. When the presiding official sustained the removal, appellant petitioned for review, contending that the presiding official erred in denying a motion for continuance and in deciding the appeal based on the record.

According to the record, appellant's hearing was postponed twice, once because his attorney was unavailable and once because appellant was hospitalized. Upon seeking medical documentation of appellant's condition, the presiding official learned that appellant had been released from the hospital and subsequently set another hearing date. By conversation he informed an employee of appellant's attorney of the date of the rescheduled hearing and also confirmed such date by letter. However, one day before the hearing was to be held, appellant's attorney submitted a motion for continuance, stating that he was involved in a trial and therefore unable to attend the hearing and that appellant was still ill.

In considering appellant's position, the Board noted that his attorney's final request for continuance was supported neither by an affadavit as required by 5 C.F.R. §1201.51, nor by medical evidence identifying appellant's problem and why it prevented him from attending the hearing. Further, citing *Webster v. Government of the District of Columbia,* MSPB Docket No. DC07528010230 (July 28, 1981), the Board pointed out that appellant failed to contact the presiding official to request postponement either as required by Board regulations or at the earliest possible date.

The Board explained that an appellant has a statutory right to a hearing and that the presiding official—who has the authority to set the hearing—may postpone the hearing if good cause is shown for doing so. The Board noted that in appellant's case, the presiding official had granted two postponements and had been diligent in contacting appellant's attorney about appellant's status. Determining that appellant's attorney failed to supply the documentation necessary for obtaining a continuance of the hearing, the Board found no showing of good cause for a third continuance. The Board further explained that unless extraordinary circumstances arise, Board policy, which was adopted to accommodate the intent of Congress, is to hold hearings promptly. Moreover, the Board noted that delays, such as those in this case, may by unfair to other appellants who are awaiting hearings, especially if those appellants are unemployed while their appeals are pending. Accordingly, the Board denied appellant's petition.

LAURENE M. KNOX v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Docket No. CH07528110583)
October 15, 1982

1.111; 6.125; 10.1214

Appellant was separated from her position of paralegal specialist by reduction in force (RIF). According to the record, the agency notified appellant that her position was to be abolished on July 1, 1981 and offered her a clerk position with retained grade and pay. Subsequently, the agency changed the effective date of the RIF to August 14. On July 27, appellant declined the clerk position and offered her resignation, effective August 14. When appellant learned that another position, which was interchangeable with hers, had become available during the notice period, she tried to withdraw her resignation. However, the agency did not accept appellant's withdrawal, and appellant was separated on August 14. When appellant appealed her separation to the Board's regional office, the presiding official found that appellant had resigned voluntarily from her position and that the agency had properly applied RIF regulations in separating her. Appellant petitioned for review.

In considering appellant's petition, the Board explained that while resignation is a voluntary action not subject to the Board's appellate review, a coerced resignation is considered tantamount to discharge. Citing *Fruhauf Southwest Garment Co. v. United States*, 111 F. Supp. 945, 951 (Ct. Cl. 1953), the Board outlined the three conditions an appellant must satisfy in order to show that his or her resignation was not voluntary. They were:

1. That one side involuntarily accepted the terms of another;
2. That circumstances permitted no other alternative; and
3. That said circumstances were the result of coercive acts of the opposite party.

The Board agreed with the presiding official's finding that appellant did not show that any of the three conditions existed in her case.

The Board noted appellant's argument that her resignation was involuntary because the agency refused to allow her to withdraw it before its effective date. The Board pointed out that although 5 C.F.R. §715.202(b) provides that an agency may permit an employee to withdraw his resignation at any time before it becomes effective, an agency may refuse to accept such a withdrawal if its consequences would cause administrative disruption. The Board found that the agency had shown that allowing appellant to withdraw her resignation would have adversely affected those employees whose jobs had been saved by appellant's resignation. Further, the Board agreed with the presiding official's finding that withdrawing appellant's resignation would have seriously disrupted the agency's nationwide RIF process. However, the Board disagreed with the presiding official's finding regarding Board jurisdiction over appellant's separation by RIF. The Board determined that since appellant's resignation and the RIF action were effective the same day, appellant was separated not as a result of RIF, but because she resigned. Accordingly, the Board found that since appellant failed to prove that her resignation was involuntary, her case was not within the Board's jurisdiction. Therefore, the Board affirmed the initial decision in part and reversed it in part, dismissing the action as outside the Board's appellate jurisdiction.

ROY L. SCHAPANSKY v. DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION (Docket No. DA075281F1130)
October 28, 1982

1.330; 1.410; 4.125; 7.327; 8.290; 10.12123

When appellant was removed from the position of air traffic control specialist for participating in a strike and for absence without leave (AWOL), he appealed to the Board's regional office. The presiding official, finding that appellant refused to perform his duties when he participated in the strike, sustained the agency's action. Appellant petitioned for review.

The Board considered appellant's argument that the presiding official should not have denied his motion for continuance of the hearing. Though appellant alleged that because the agency produced certain evidence only three days before the hearing, he could not properly prepare his case, the Board noted that the presiding official extended the proceedings by 14 days so that appellant could review and comment upon the material submitted by the agency. The Board pointed out that appellant made no submission regarding the agency information in question and determined that the presiding official's denial of appellant's motion for continuance did not adversely affect appellant's rights.

The Board also considered appellant's contention that the presiding official erred in denying his request for an extension of time for discovery. The Board noted that appellant made such a request so that he might have adequate time to consult information obtained by other aggrieved air traffic controllers through regional and national discovery procedures. The Board explained, however, that by order of April 7, 1982, the Board's Chief Administrative Law Judge instituted procedures for common discovery on matters of regional and national scope in related air traffic controller appeals. The Board stated that that order restricted participation in such discovery to those appellant air traffic controllers who had filed timely discovery requests under the pre-hearing orders issued by the Board's regional offices. Determining that appellant did not comply with the prehearing order of the Board's Dallas Regional Office by filing a discovery motion before the deadline established by that regional office, the Board found that the presiding official did not deny appellant due process by refusing to extend the discovery period.

The Board noted appellant's argument that the evidence failed to show that he participated in the strike. However, the Board also noted appellant's contention that although he was AWOL on the dates of the strike, he believed that his voluntary absence was a legal protest rather than a strike. The Board further noted that while appellant testified that he voted "yes" when the Professional Air Traffic Controllers Organization (PATCO) members took a strike vote and that the agency had informed appellant that the strike would be illegal, appellant also claimed that he was unaware of the strike and had no intention of participating. The Board agreed with the presiding official and gave such contentions no credence.

The Board discussed the agency's use of a photograph of appellant among PATCO picketers to show that he had participated in the strike. The Board cited *Jones v. Tennessee Valley Authority,* MSPB Docket No. AT07528010300 at 7 (February 19, 1982) and *Duckett and Yardley v. Tennessee Valley Authority,* MSPB Docket No. AT07528010325 at 6 (February 19, 1982) in which it held that evidence of an employee's unauthorized absence from duty and his presence among picketers may be *prima facie* indication of that employee's participation in a strike. Finding that appellant failed to rebut agency evidence of his knowledge of the strike and his intent to join other PATCO members in withholding service to the agency, and that he gave no indication that his absence was for some other reason than strike participation, the Board determined that appellant did participate in the strike. Further, the Board considered appellant's allegation that the agency improperly relied upon the "crime provision" of 5 U.S.C. §7513(b) in waiving the 30-day period of advance written notice of adverse action, since he had not been formally charged or convicted of a crime. However, the Board—pointing out that striking against the United States is a felony punishable by up to a year's imprisonment—found that the agency had reasonable cause to believe that appellant had committed a crime for which a sentence of imprisonment might be imposed.

The Board considered the reasonableness of the penalty in appellant's case, noting that an employee's participation in a strike against the government hampers the government's attempts to fulfill its mission. Citing *Borsari v. Federal Aviation Administration,* MSPB Docket No. NY075209163 at 5-7 (June 24, 1982), the Board further noted that an air traffic controller's abdication of his responsibility for the safety of airline passengers by striking constitutes extreme misconduct. Accordingly, the Board found the agency's penalty appropriate. Therefore, the Board affirmed the initial decision as modified and sustained appellant's removal.

LOUIS H. STEELMAN v. DEPARTMENT OF THE AIR FORCE (Docket No. DA07528110279)
October 25, 1982

1.369; 3.130; 3.1321; 11.133

Appellant, reduced in grade for physical inability to perform the duties of his position, appealed to the Board's regional office. The presiding official sustained the agency's action. Subsequently, appellant filed a petition for review, alleging that in failing to accommodate his disability, hearing loss, the agency discriminated against him because of his handicapping condition.

The Board noted the presiding official's finding that appellant was a handicapped person according to 29 C.F.R. §1613.702(a) in that he had "a physical or mental impairment which subsequently limits one or more of [his] major life activities." However, the Board explained that to substantiate his charge of handicap discrimination, appellant was required by 29 C.F.R. §1613.702(f) to show that he was a "qualified handicapped person" and that his handicap had not been accommodated by the agency. The Board quoted the applicable regulations, which describe a "qualified handicapped person" as one who "with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of [himself] or others." The Board added that the responsibility was appellant's to suggest a reasonable accommodation under which he could perform his duties.

According to the record, when appellant's supervisors learned of his hearing problem, they transferred him to a non-hazardous noise area where he worked successfully on assembly lines until the agency took action to reduce his grade and change his position from power support systems mechanic to shipment clerk. Appellant claimed that if he were allowed to remain where he had been reassigned, he could continue to perform the essential functions of his original position. Appellant further contended that other mechanics worked exclusively on assembly lines, that these particular mechanics did not have required duties in the hazardous noise area, and that the agency had assigned one of the mechanics to assembly line work to accommodate a hearing loss. The Board concluded that appellant had put forward a reasonable accommodation.

The Board explained that the agency had the burden of showing that the accommodation proposed by appellant was unreasonable; however, it found that the agency failed to do so. Determining that sufficient work existed for appellant in areas where he could perform his duties safely, the Board concluded that appellant's reduction in grade was a result of handicap discrimination. Therefore, the Board reversed the initial decision and ordered the agency to cancel its action against appellant.

HAROLD J. SULLIVAN v. DEPARTMENT OF THE NAVY (Docket No. AT07528010144)
October 4, 1982

1.500; 1.530; 4.300; 10.1212; 11.140

Appellant was charged with claiming credit for time not actually worked, and removed from the position of education specialist. When the Board's regional office sustained the removal, appellant petitioned for review, contending that the presiding official erred in interpreting pertinent regulations.

The Board considered appellant's contention that by not providing him with certain material used in taking action against him—specifically, information the agency obtained after appellant responded to the advance notice of charges—the agency violated 5 C.F.R. §752.404. The Board cited subsections (b) and (c) of §752.404 which require that the notice of proposal inform the employee of his right to review the material relied on to support an action and that the employee be given time to review such material and to prepare a response. The Board noted, however, that the subsections clearly concern only the information supporting the action at the time the agency issues the advance notice. Further, the Board pointed out that §752.404 neither precludes the agency from developing additional evidence after the employee responds to the advance notice nor requires that the agency provide the employee with all supporting material that exists when the agency issues its decision. The Board agreed with the presiding official's finding that the agency had provided appellant all material in support of its advance notice of charges and noted that the agency had even given appellant an additional chance to respond before issuing the decision.

The Board also considered appellant's contention that because the Navy Intelligence Service (NIS) destroyed the file which contained most of the information gathered against him, the evidence presented in his case by NIS personnel should be stricken from the record. The Board explained that in *Banks and Faulkner v. Federal Aviation Administration*, MSPB Docket Nos. DA07528010296/0206 (January 27, 1982), it found that imposing sanctions against an agency for failing to produce relevant evidence which had been destroyed was inappropriate.* Noting that its conclu-

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*Editor's note: In a recent decision, the Fifth Circuit Court of Appeals reversed the Board's decision in *Banks and Faulkner*. The court found that the required standard of procedural due process had been violated when the only persuasive evidence of alleged drug use—the results of government-sponsored laboratory tests done on urine samples voluntarily submitted by the appellants—was destroyed before the appellants, on their own behalf, could have the samples independently tested. See *Banks v. Federal Aviation Administration*, No. 82-4086, slip op. (5th Cir., Sept. 27, 1982).

sion in *Banks and Faulkner* was based upon the degree of culpability of the agency, whether "bad faith" was demonstrated, and the availability of testimony regarding the destroyed evidence, the Board found that in appellant's case, the evidence destroyed was less directly relevant to the issues in question and determined that ample opportunity existed for testimony regarding the destroyed evidence.

The Board discussed appellant's argument that he was subject to prohibited personnel practices, specifically, reprisal for disclosing information which showed violation of laws or regulations or an abuse of authority and reprisal for the exercise of appeal rights. The Board noted that appellant had filed a grievance against the official who started the investigation into appellant's claims regarding time worked and that reprisal for this grievance prompted the investigation. However, the Board determined that ordering such an investigation did not constitute taking a personnel action. Accordingly, the Board denied appellant's petition for review.

MARSHALL L. SUNDERLAND v. VETERANS ADMINISTRATION (Docket No. AT07528110538)
October 29, 1982

1.111; 1.369; 6.900

When appellant was separated by resignation, he appealed to the Board's regional office, alleging that the agency had separated him involuntarily. However, the presiding official found that appellant had resigned voluntarily and therefore dismissed his appeal as not within the Board's appellate jurisdiction. Consequently, appellant petitioned for review, contending that he had submitted his resignation under duress and that the agency had refused to allow him to withdraw the resignation before its effective date.

Upon considering appellant's petition and the record, the Board disagreed with the presiding official's finding that the agency's refusal to allow appellant to withdraw his resignation was reasonable. The Board found appellant's January 27, 1981 letter, requesting that the acting hospital director rescind the resignation form submitted by appellant on January 26, 1981 for resignation effective February 25, 1981, timely and clear in its intent. Further, the Board noted that the agency's February 11, 1981 response gave no reason for denying appellant's request that his resignation be withdrawn and stated that his resignation would be effected on February 25, 1981.

Citing 5 C.F.R. §715.202, the Board explained that while an agency may permit an employee to withdraw his resignation before it becomes effective, it may decline such a request only for a valid reason, such as to avoid administrative disruption or because a replacement has been hired. Determining that the agency improperly denied appellant's request to withdraw his resignation, the Board found that appellant's resignation was involuntary and that the agency had not afforded him the adverse action rights to which he was entitled. Accordingly, the Board reversed the initial decision and ordered the agency to cancel appellant's resignation and restore him retroactively to the date of his resignation.

THOMAS WIGINTON v. VETERANS ADMINISTRATION (Docket No. DA07528110207)
October 12, 1982

1.400; 1.510; 1.513; 10.1212; 10.122

When appellant was removed from the position of social worker, he appealed to the Board's regional office, questioning the statement of the charges against him in the notice of proposed removal. The presiding official sustained the removal, and appellant subsequently petitioned for review.

In reviewing the record, the Board noted the agency's contention at the hearing that the charge against appellant was falsification of records, as well as appellant's argument that falsification was a new charge not included in the notice of proposed removal. Citing *Parker v. Defense Logistics Agency*, 1 MSPB 489, 492 (1980), the Board explained that an agency action will not be reversed merely "because of technical procedural oversights which have not substantially prejudiced or impaired the employee's rights." The Board further explained that in order to determine whether appellant was harmed by the alleged error in the notice of proposed removal, it must, according to *Smith v. Department of the Interior*, MSPB Docket No. DA075209129 at 2 (December 29, 1981), consider whether the notice was "specific enough so that the employee is presented with sufficient information to enable him or her to make an informed reply." Though the Board disagreed with the presiding official's finding that appellant was properly informed that the charge against him was falsification of records, it did not find that appellant was substantially harmed by the error.

The Board pointed out that the notice of proposed removal listed 17 specific instances of alleged error in appellant's worksheets and that some of these report entries indicated contacts with outpatients that could not have been made because the patients noted were either no longer under the agency's supervision or were dead. The Board found that the instances presented in the notice of proposed removal were of sufficient detail to inform appellant of the reasons for the proposed action. Moreover, the Board found that the agency proved 14 of the 17 instances of error by a preponderance of the evidence. The Board also found no evidence of bias on the part of the agency's deciding official and determined that appellant's contention that the agency based his removal on personal animosity was unfounded.

The Board also considered appellant's contention that because the action against him was based on his performance, he should have been informed in writing of the requirements of his position and how he failed to meet them. Citing *Douglas v. Veterans Administration*, MSPB Docket No. AT075299006 at 32-33 (April 10, 1981), the Board explained that relevant in determining the appropriateness of a penalty was "the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question." Though the record indicated that the agency failed to inform or counsel appellant about his deficient work, the Board found that appellant's errors were so flagrant and obvious that appellant should have known without being told by a supervisor that the information on his worksheets was wrong. Further, the Board noted that according to *Douglas*, whether an employee's behavior is intentional is relevant. Stating that in appellant's case, his intent weighed heavily in favor of imposing severe discipline, the Board found that the penalty of removal was reasonable. Accordingly, the Board affirmed the initial decision as modified and sustained appellant's removal.

ATTORNEY FEES

VERA M. BARRETT v. DEPARTMENT OF THE AIR FORCE (Docket No. DC07528010046ADD)
October 1, 1982

14.520; 14.550

Appellant was charged with fraud or negligence in failing to pay rent for her assigned living quarters and removed from the position of supervisory billeting clerk. When she appealed to the Board's regional office, the presiding official sustained the removal action. However, upon consideration of appellant's petition for review, the Board found that the agency established neither that appellant was obligated to pay a rental fee nor that she knew or should have known of that responsibility. Therefore, the Board vacated the presiding official's decision and reversed the agency's action. Appellant subsequently filed a motion for attorney fees. When the presiding official denied appellant's motion, finding that appellant failed to prove that such an award would be in the interest of justice, appellant petitioned for review.

In considering appellant's petition, the Board discussed the presiding official's finding that the agency had a reasonable basis for taking the action and that appellant was not substantially innocent of the charges. The Board noted that the presiding official based this conclusion on appellant's failure to seek clarification of the regulation applying to her situation and on appellant's alleged inculpatory statement—reported by a confidential informant—about her situation. However, the Board could not concur with the presiding official's determination that the agency had a reasonable basis for concluding that she was guilty of fraud.

Citing *Allen v. U.S. Postal Service*, 2 MSPB 582 (1980), the Board explained that an agency's failure to prove charges against an employee does not necessarily mean that a fee award is warranted in the interest of justice. However, the Board noted that attorney fees may be awarded when the record indicates that the agency's action was without merit or unfounded, or if the employee is innocent of the charges.

The Board, pointing out that agency officials believed that appellant was not responsible for the rent and that appellant's living arrangement was legal, concluded that a proper consideration of the evidence should have indicated that the action against appellant could not be sustained. Accordingly, the Board found appellant entitled to an award of attorney fees. Further, the Board determined that in light of the attorney's extensive experience, the complexity of appellant's case, and the time necessary to research the issues in question, a total of $9,550 in attorney fees was reasonable. Therefore, the Board reversed the addendum decision and ordered the agency to send payment to appellant's attorney.

EVELYN FRANKS v. DEPARTMENT OF THE TREASURY (Docket No. BN07528010001ADD)
October 29, 1982

10.430; 14.520; 14.522; 14.530; 14.550; 14.600

Appellant was removed from the position of clerk typist for underreporting her income on two tax returns and appealed the agency's action to the Board's regional office. Though the presiding official found the charge supported by a preponderance of the evidence, he determined that the penalty in appellant's case was too harsh and ordered the agency to cancel the removal.

When appellant's attorney filed a motion for attorney fees, the agency opposed the motion, alleging that in a settlement agreement made by the parties on January 2, 1981, appellant waived her right to seek attorney fees. However, in an addendum decision issued May 19, 1981, the presiding official determined that the settlement agreement was null and that attorney fees were warranted in appellant's case. Consequently, the agency and the Office of Personnel Management both petitioned for review.

The Board disagreed with the agency's argument that in the settlement agreement—which was entered into after the initial decision became final—appellant had waived her right to request attorney fees. Pointing out that the presiding official did not learn of such agreement until after appellant's attorney had filed a motion for attorney fees and, thus, that the settlement was not a part of the record before the initial decision became final, the Board stated that it would not consider that document in reviewing the merits of the case. Nonetheless, the Board determined that the language in the agreement, in stating that appellant "waives her right to seek further processing, review, or other appellate or judicial review of the matter now pending before the [Board]," could not be interpreted as specifically concerning the matter of attorney fees.

The Board also noted that the agency challenged the presiding official's finding that the agency acted in bad faith. The agency specifically objected to his implication that it should have advised appellant to seek representation. However, the Board did not agree that the presiding official's conclusion was that appellant was entitled to a representative. The Board explained that the presiding official concluded that the agency's interviews with appellant were unfair and thus in bad faith because appellant was questioned by three high-level management officials without benefit of either a representative or her tax records.

Further, the Board considered the agency's disagreement with the presiding official's finding that the agency's action was "clearly without merit" but found no evidence of error by the presiding official. The Board explained that according to the record, in 50 of 51 of the agency's cases of underreported income, the most severe penalty—which was issued in only four cases—was a 10-day suspension. The Board added that though the remaining case did result in the removal of an employee, the case involved over $10,000 in unreported income, whereas appellant's case concerned less than $4,000.

Agreeing with the presiding official's conclusion that an award of attorney fees was warranted in the interests of justice, the Board explained that according to 5 U.S.C. §7701(g)(1), the amount of such award must be reasonable. Noting that appellant's attorney was union-employed, the Board pointed out that the record was unclear as to whether the attorney fee would be retained by appellant's attorney or turned over to the union and as to what the $50 per hour billing rate exactly constituted. Therefore, the Board affirmed the addendum decision regarding appellant's entitlement to attorney fees but vacated it regarding the findings about reasonableness of the fees. The Board remanded the case to the regional office for further development of the record under the guidelines established in *Powell v. Department of the Treasury*, MSPB Docket No. DC075299039 (October 2, 1981).

PERFORMANCE

ROBERT B. CLEMONS v. DEPARTMENT OF AGRICULTURE (Docket No. DC531D8110487)

October 4, 1982

3.120; 9.110; 9.214; 9.320; 10.1211; 11.140

Because it determined that appellant's performance was not of an acceptable level of competence (ALOC), the agency denied his within-grade increase. When appellant appealed the agency's action to the Board's regional office, the presiding official sustained the agency's ALOC determination, and appellant filed a petition for review.

The presiding official addressed appellant's arguments that the denial of his within-grade increase was not based on substantial evidence and that the agency committed prohibited personnel practices in effecting it. However, the presiding official determined that the agency had supported its action with substantial evidence and that appellant failed to show that the denial of the within-grade increase was the agency's retaliation for his filing an equal employment opportunity complaint. Furthermore, the presiding official found that the agency had timely informed appellant of his poor performance and had properly evaluated appellant's work in light of his performance standards.

In considering appellant's petition, the Board noted his contention that the agency did not base its ALOC determination on the essential requirements of his position, since his performance standards were inconsistent with his position description. Specifically, appellant pointed out that his performance standards required him to obtain work assignments independently, while his position description indicated that he would be assigned work. The Board noted that appellant's position description, which stated that "assignments are to be made in general terms," did not indicate how appellant was to procure his assignments. Therefore, the Board found appellant's performance standards consistent with the broader terms of his position description. Further, the Board noted that the agency, in reaching its ALOC determination, did not even consider appellant's performance in procuring work assignments. Rather, the agency considered appellant's performance of an essential part of his job—systems analysis—and found that he failed to demonstrate competency in that area.

The Board discussed appellant's charges that the agency established a pattern and practice of race and sex discrimination in its employment policies, that his within-grade increase was denied because agency officials were inclined to discriminate against blacks, and that the presiding official erred in refusing to accept evidence about these matters. The Board explained that the presiding official may, at his discretion, take action to avoid delay in the disposition of all proceedings and to exclude immaterial evidence. Determining that the presiding official in appellant's case did not abuse her discretion in refusing to admit evidence about an alleged agency-wide discrimination practice, the Board found that appellant did not relate his allegations of agency discrimination practices to the agency's action against him. Moreover, the Board determined that admitting evidence concerning personnel actions other than ALOC determinations would have unduly delayed the proceedings and that such evidence would have been of limited probative value in establishing his supervisor's motive for denying his within-grade increase. Accordingly, the Board denied appellant's petition and sustained the agency's denial of his within-grade increase.

REDUCTION IN FORCE

CHARLES E. KNAB and JOSEPH M. BURKE, JR. v. NATIONAL AERONAUTICS AND SPACE ADMINISTRATION (Docket No. AT03518110084)
October 22, 1982

6.420; 10.121; 10.1215; 12.110; 12.421

Appellants were reduced in grade through reduction in force (RIF) procedures. When they appealed to the Board's regional office, the presiding official joined the appeals, since they involved similar issues. The presiding official sustained the RIF action in appellant Burke's case, but reversed it in appellant Knab's case, finding that appellant Knab had identified and was eligible to be placed in any one of several positions occupied by non-preference eligible employees in a lower retention subgroup than he. Consequently, appellant Burke filed a petition for review of the presiding official's decision to sustain the agency's action, and the agency petitioned for review of the presiding official's decision about appellant Knab's assignment rights.

In considering appellant Burke's contentions, the Board found that the agency properly invoked RIF procedures for purpose of reorganization, that appellant's competitive level was properly established, and that appellant failed to prove that the agency's action indicated discrimination against him for reasons of age and sex. Further, the Board discussed appellant's claim that available supervisory positions classified in a series other than his GS-334 supervisory computer systems analyst series properly should have been classified as GS-334 positions to which appellant could have been assigned. The Board pointed out that whether a position's grade, level and job classification series are proper is a matter appealable to the Office of Personnel Management and not within the Board's jurisdiction. The Board also considered appellant's argument that he was qualified to fill either one of two vacant branch chief positions, but noted that the agency was not required to fill these newly created positions during the RIF action.

In considering the agency's petition regarding appellant Knab, the Board noted the agency's contention that appellant had not properly raised the matter of his assignment rights to the nine engineering positions occupied by employees in a lower retention subgroup because appellant did not raise such issue until the closing remarks at the hearing. However, the Board pointed out that appellant's written reply to the proposed RIF mentioned that the agency had not considered his assignment rights regarding "any of the other positions reflected in the retention register." Though the agency claimed that it carefully considered appellant's qualifications and retention standing against other occupied positions and that appellant was not qualified for any of the nine positions in question, the Board noted the presiding official's finding that the nine position descriptions were identical in title, series, and grade to appellant's. The Board also noted appellant's claim—which was reiterated by appellant Burke testifying on appellant Knab's behalf—that he was familiar with the program and systems involved in the nine jobs.

The Board explained that when an employee raises the issue of assignment rights, the agency has the burden of proving that it followed RIF regulations in effecting the employee's assignment. However, the Board found that in appellant Knab's case, the agency failed to prove by a preponderance of the evidence that it had afforded appellant his substantive rights. Accordingly, the Board denied the petitions of appellant Burke and the agency and ordered the agency to cancel the action reducing appellant Knab in grade and to place him either in one of the nine positions discussed or in one similar.

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NOTES ON KEY NUMBERS

In each issue, summarized Board orders, as well as other issuances listed under "Orders Issued by the Board," are indexed according to the key number system used in the published volumes, *Decisions of the United States Merit Systems Protection Board.* The index numbers, which indicate the subjects found in the decision, are listed after the order date. There are 18 main subject areas. These are described under "Major Topics and Scope Notes." The "Outline of Topics" divides each major topic into more specific subtopics.

MAJOR TOPICS AND SCOPE NOTES

Topic

1.000000 ADVERSE ACTIONS

Certain personnel actions are designated as "adverse actions" under Chapter 75 of the Civil Service Reform Act of 1978. This topic references Board opinions relating to the substantive law governing those actions and distinguishes other personnel actions not designated as "adverse actions" under Chapter 75. This topic also encompasses cases involving Board consideration of penalties in adverse action cases including the mitigation of penalties. Board cases concerning procedures governing adverse actions are located under *Practice and Procedure (10.000000),* and opinions relating to jurisdictional matters have been placed under *Jurisdiction (6.000000).* Cases regarding remedies available to the Board in adverse action cases are located in *Remedies (14.000000).*

2.000000 CONSTITUTIONALITY

This topic references opinions in which the Board has considered constitutional aspects of cases before it. Included are claims pursuant to specific constitutional provisions, as well as claims derived from constitutional provisions, such as the right to privacy. Constitutional claims relative to discrimination are in *Discrimination (3.000000).*

3.000000 DISCRIMINATION

This topic refers to Board cases concerning the substantive law of prohibited discrimination pursuant to the Civil Service Reform Act of 1978. Also included are cases relating to affirmative action and disparate treatment of similarly situated employees. Questions of evidence, jurisdiction, practice and procedure, and remedial action in discrimination cases are referenced in *Evidence (4.000000), Jurisdiction (6.000000), Practice and Procedure (10.000000),* and *Remedies (14.000000),* respectively.

4.000000 EVIDENCE

This topic references cases dealing with substantive rules of evidence employed by the Board, as well as cases concerning the harmful error standard in the Act. The Board is bound by statutory burdens of proof, and cases referencing the Board's interpretation of such burdens are also included here.

5.000000 FREEDOM OF INFORMATION, PRIVACY, AND SUNSHINE ACTS

This topic references Board cases relating to the Freedom of Information, Privacy, and Sunshine Acts.

6.000000 JURISDICTION

This topic includes cases in which the Board has made specific reference to jurisdiction under the Civil Service Reform Act of 1978, as well as cases dealing with issues of justiciability. Since the jurisdiction of the Board differs with respect to certain entities, this topic includes cases dealing with jurisdictional questions particularly related to such entities. Included also are Board cases dealing with its enforcement power, which is a matter of continuing jurisdiction, and cases under the Act's savings provision. Jurisdiction over appeals related to retirement is covered under *Retirement (15.000000).*

7.000000 LABOR-MANAGEMENT RELATIONS

This topic contains cases arising under Title VII of the Act, including collective bargaining issues and the rights of individual employees. Title VII grievance procedure cases brought before the Board are also located under this topic.

8.000000 PARTICULAR EMPLOYMENT CATEGORIES

The Civil Service Reform Act of 1978 has provisions specifically applicable to certain categories of employees. This topic references cases in which the special procedural and substantive law applicable to such employee categories were discussed by the Board, and in which such special provisions were ger-

mane to the resolution of the case. Included are cases dealing with the merit pay provisions of the Act and the Senior Executive Service.

9.000000 PERFORMANCE RELATED ACTIONS

This topic references cases dealing with performance related actions under Chapter 43 of the Act, including procedural rights and standards of proof under Chapter 43, where performance appraisal systems have been implemented. Also included are cases dealing with performance appraisal actions under Chapter 75, where Chapter 43 appraisal systems have not yet been implemented.

10.000000 PRACTICE AND PROCEDURE

This is the major topic referencing cases which set out the procedural rules for matters before the Board, its administrative law judges, and its presiding officials. Matters such as timeliness and technical filing rules are included here, as well as the concepts of former adjudication and representation of parties.

11.000000 PROHIBITED PERSONNEL PRACTICES

The Civil Service Reform Act of 1978 lists merit systems principles governing the Federal work force and defines prohibited personnel practices that may not be taken against Federal employees. This topic is limited to cases in which the Board has interpreted these provisions and related matters.

12.000000 REDUCTIONS IN FORCE

This topic refers to Board cases dealing with reductions in force, including agency justifications for taking such actions and the substantive and procedural rights of employees affected.

13.000000 REGULATION REVIEW

The Civil Service Reform Act of 1978 empowers the Board to review regulations promulgated by the Office of Personnel Management and implementing regulations of other agencies. This topic references Board opinions dealing with such regulation review.

14.000000 REMEDIES

This topic references Board cases dealing with the remedial powers of the Board.

15.000000 RETIREMENT

This topic refers to Board cases involving issues relating to the retirement of Federal employees.

16.000000 SPECIAL COUNSEL

This topic references Board cases relating to the Office of Special Counsel, including the prosecution of Hatch Act cases and violations of the Federal Employees Flexible and Compressed Work Schedules Act. The filing requisites for complaints before the Special Counsel are included here, while procedural requisites in Special Counsel cases before the Board are in *Practice and Procedure (10.000000).*

17.000000 SUITABILITY AND FITNESS FOR DUTY EXAMINATIONS

This topic references cases dealing with issues of suitability. Included also are cases involving fitness-for-duty examinations.

18.000000 EMPLOYMENT PRACTICES

This topic references cases concerning the substantive law governing employment practices and distinguishes employment restrictions that are not appealable employment practices.

OUTLINE OF TOPICS

(With Key Numbers)

1.000000 Adverse Actions

1.100 ACTIONS CONSIDERED ADVERSE UNDER 5 U.S.C. 7512

1.110	**Removal**
1.111	Involuntary Resignation or Retirement
1.120	**Suspension for more than 14 days**
1.121	Enforced Leave
1.130	**Reduction in Grade**
1.131	Involuntary Demotion
1.140	**Reduction in Pay**
1.150	**Furlough of 30 days or less**
1.160	**Adverse Action by Office of Personnel Management**

1.200 ACTIONS NOT CONSIDERED ADVERSE UNDER 5 U.S.C. 7512

1.210	**Suspension for less than 14 days**
1.220	**Letter of Reprimand**
1.230	**Actions Based on Unacceptable Performance**
1.231	Denial of Within-Grade Step Increase
1.232	Reduction in Grade
1.233	Removal
1.240	**Reduction in Force**
1.250	**Reduction in Rank**

1.300 SUBSTANTIVE CHARGES

1.310	**Attendance Related**
1.311	Absence Without Leave
1.312	Abuse of Leave
1.313	Tardiness
1.314	Efficiency of the Service—Attendance
1.320	**Alcohol and Drug Related**
1.321	On-Duty Conduct
1.322	Off-Duty Conduct
1.330	**Criminal Conduct**
1.331	On-Duty Conduct
1.3311	Criminal Charges
1.3312	Criminal Conviction
1.332	Off-Duty Conduct
1.3321	Criminal Charges
1.3322	Criminal Conviction
1.340	**Dishonest Work Related Conduct**
1.341	Bribery
1.342	Embezzlement
1.343	Falsification
1.3431	Medical Record
1.3432	Employment Applications
1.3433	Time and Work Records
1.344	Fraud
1.345	Misappropriation and/or Misuse of Government Property
1.346	Malfeasance in Office
1.350	**Prohibited Political Activity**
1.360	**Other Work Related Charges**
1.361	Abuse of Authority
1.3611	Sexual Harassment
1.3612	Prohibited Discrimination
1.362	Conflict of Interest
1.363	Insubordination
1.3631	Refusal to Accept Reassignment
1.364	Gross Waste
1.365	Creation of Danger to Public Health and Safety
1.366	Insolence
1.367	Violence
1.368	Unauthorized Activities

1.369 "Failure to" Charges
1.370 Charges Related to Off-Duty Conduct
1.371 Efficiency of the Service
1.3711 Nexus
1.380 Classification and Qualifications Requirements
1.390 Performance Related

1.400 BOARD CONSIDERATION OF PENALTIES

1.410 Mitigation of Penalty
1.420 Prior Disciplinary Record
1.430 Disparate Treatment of Similarly Situated Employees

1.500 PROCEDURAL RIGHTS IN ADVERSE ACTIONS

1.510 Notice
1.511 Crime Provision
1.512 Emergency Suspension During Notice Period
1.513 Reasons
1.520 Reply
1.521 Written Reply
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1.530 Review of Materials on Which Action Based
1.540 Right to Representation
1.550 Proposing and Deciding Official
1.560 Appeal to Merit Systems Protection Board
1.561 Burden of Proof
1.562 Efficiency of the Service—Generally
1.570 Decision

1.600 DEFENSE

1.610 Stale Charges
1.620 Mental Conditions
1.630 Animus
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2.100 DUE PROCESS

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2.200 CRIMINAL CONSTITUTIONAL CONSIDERATIONS

2.210 Self-Incrimination
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2.300 FIRST AMENDMENT FREEDOMS

2.310 Freedom of Speech
2.311 Relation of Efficiency of the Service
2.3111 Defamation
2.312 Balancing Test
2.313 Mixed Motive
2.320 Freedom of Religion
2.321 Relation of Efficiency of the Service
2.3211 Free Exercise
2.3212 Establishment

2.400 RIGHT TO PRIVACY

3.000000 Discrimination

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3.111	Age Discrimination in Employment Act of 1967, 29 U.S.C. 631, 633a
3.120	**Race, Color, and National Origin Discrimination**
3.121	Civil Rights Act of 1964, 42 U.S.C. 2000e-16
3.130	**Handicap Discrimination**
3.131	Handicapping Condition
3.1311	Physical Disability
3.1312	Mental Disability
3.1313	Alcoholism and Drug Abuse
3.132	Rehabilitation Act of 1973, 29 U.S.C. 791
3.1321	Reasonable Accommodation
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3.133	Qualified Handicapped Employee
3.140	**Sex Discrimination**
3.141	Civil Rights Act of 1964, 42 U.S.C. 2000e-16
3.142	Fair Labor Standards Act of 1938, 29 U.S.C. 206(d)
3.143	Sexual Preference
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3.150	**Religious Discrimination**
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3.420	**Legitimate Non-discriminatory Reason**
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5.100 SUNSHINE ACT

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6.400 OFFICE OF PERSONNEL MANAGEMENT

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11.000 Practices Prohibited

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15.13111	Scope of Review
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DIGEST

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DEFINITIONS

These definitions are provided for clarification purposes only and are not intended to convey the strict legal meaning of the term.

Deciding Official—the official who renders the agency's decision.

Regional Office—the Board office authorized to receive appeals from the area where the appellant's duty station was located when the agency action was taken; there are 11 MSPB regional offices.

Initial Decision—the regional office decision made by the presiding official in response to a petition for appeal. The initial decision becomes final in 35 days unless a petition for review is filed with the Board and granted. In that case, the Board's decision becomes the final decision. If the petition for review is denied, the initial decision becomes final five days after the issuance of the denial.

Petition for Appeal—the request filed with a Board regional office for review of an agency action.

Petition for Review—the request filed with the three-member Board in Washington, D.C., for review of an initial decision of a presiding official.

Presiding Official—any person designated by the Board to preside over any hearing or to make a decision on the record. The presiding official referred to in the DIGEST summaries is usually a Board regional office official designated by the Board to perform these duties.

Proposing Official—the agency official who initiates an action to be taken against an employee.

Addendum Decision—an addendum decision deals with attorney fees.

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UNITED STATES MERIT SYSTEMS PROTECTION BOARD

Washington, D.C. 20419

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United States Merit Systems Protection Board

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CASE SUMMARIES

Adverse Actions

EARLE A. ANTHONY v. DEPARTMENT OF DEFENSE (Docket No. DC07528210428)
November 5, 1982

6.120; 7.1151; 10.811

After the agency issued a notice on November 10, 1981 proposing to remove him from the position of teacher, appellant filed a petition for appeal on December 8, 1981 and then a grievance on December 17, 1981, alleging that his removal was based on race discrimination. By memorandum dated January 14, 1982, the agency informed appellant that his removal was to become effective on January 24, 1982 and that he could not pursue both avenues of appeal. The memorandum directed appellant either to file a grievance within 10 days of receipt of the memorandum or to appeal to the Board within 20 days of the effective date of the removal. Consequently, appellant grieved his removal on January 20, 1982 and was removed on January 24, 1982.

On February 1, 1982, the Board's presiding official requested appellant to show why his premature petition should not be dismissed for lack of Board jurisdiction under 5 C.F.R. §1201.3. Subsequently, the presiding official received correspondence from the agency requesting that appellant clarify whether he was appealing to the Board or following grievance procedures. Also, the appellant contacted the regional office several times to submit a copy of his removal notice, to request a hearing, and to report that he did not know that he could not appeal his proposed removal to the Board. Finding that appellant filed an untimely appeal, but a timely grievance, and that appellant could not appeal the agency's action to the Board under 5 U.S.C. §7121(d), the presiding official dismissed the appeal. Appellant petitioned for review, and the agency informed the Board that since appellant had withdrawn his grievance on February 18, 1982, the Board would deny him the opportunity to argue his case if it did not accept his appeal.

The Board explained that according to 5 U.S.C. §7121(d), an appellant who feels that he has been affected by a prohibited personnel practice must "timely elect whether to appeal the action to this Board or grieve the action through the procedures set forth in the collective bargaining agreement under which he/she is covered." Citing *Giesler v. Department of Transportation*, 3 MSPB 367 (1980), it noted that it routinely treats collective bargaining agreements just as it does agency regulations. The Board pointed out that the collective bargaining agreement which covered appellant requires that agency employees present grievances in writing within 10 days "after the act or specific incident giving rise to the grievance." Pointing out that appellant's removal did not actually take effect until January 24, 1982, the Board determined that the agency improperly advised appellant that his 10 days to grieve the action ran from the date of the notice until the effective date of the removal. Instead, the Board noted, the agency should have given appellant the option of appealing to the Board or grieving the action as of the effective date of the action. Noting that the appellant perfected his untimely appeal on February 12, 1982, when he submitted a copy of his removal notice to the regional office, the Board stated that appellant's appeal was within Board jurisdiction. Finding that the presiding official erred in dismissing appellant's appeal, the Board remanded the case to the regional office for further consideration.

ARTHUR A. BRYANT v. U.S. POSTAL SERVICE
(Docket No. SF07528110739)
November 29, 1982

1.3322; 1.3711; 8.210; 10.720

Appellant was removed from the position of foreman of mails for violating agency regulations by being arrested and convicted under state law. According to the record, appellant was arrested, charged, sentenced, and fined twice—once for actions involving a stolen firearm and once for stealing a car. Both convictions were as a result of *nolo contendere* pleas.

When appellant appealed his removal to the Board's regional office, the presiding official noted that the Board had the authority to apply the doctrine of collateral estoppel to preclude relitigation of issues decided in an earlier proceeding. However, he determined that a conviction resulting from a *nolo contendere* plea "does not operate as a collateral estoppel in a civil suit." Consequently, the presiding official reversed the agency's action, finding no independent evidence to support the charges, and the agency petitioned for review.

In considering the agency's petition, the Board disagreed with the presiding official, stating

> . . . the clear weight of authority provides that there is no valid distinction between a conviction upon a plea of *nolo contendere* and a conviction after a guilty plea at trial, where the basis of the agency action is the uncontested conviction and not any admission of the underlying conduct implied by the plea.

The Board explained that a conviction resulting from a *nolo contendere* plea is regarded the same as any other conviction being viewed in subsequent proceedings. Considering that *nolo contendere* pleas are thus indistinguishable from other convictions and that both the courts and the Board have applied the doctrine of collateral estoppel to criminal convictions in civil proceedings, the Board concluded that the doctrine was applicable to the convictions on which appellant's removal was based. Further, the Board noted that foreman of mails was an important position requiring a responsible person. Stating that "the agency can no longer maintain . . . requisite confidence in appellant's ability to handle his duties in a trustworthy manner," the Board found sufficient nexus established between appellant's convictions and his removal. Accordingly, the Board reversed the initial decision and sustained appellant's removal.

MERVYN COUGHLAN v. DEPARTMENT OF THE NAVY (Docket No. SF07528110372)
November 22, 1982

1.400; 14.700

Appellant, a planner and estimator, was demoted to the position of equipment mechanic for inefficiently planning the removal of turbines from a submarine. When he appealed to the Board's regional office, the presiding official sustained the charges but reversed the demotion, determining that the agency should have considered alternative sanctions before choosing the penalty of removal. The agency petitioned for review, and the Office of Personnel Management (OPM) intervened, both questioning the presiding official's application of *Douglas v. Veterans Administration*, MSPB Docket No. AT075299006 (April 10, 1981), in mitigating the penalty. OPM also contended that the presiding official erred in determining that the agency should have considered the alternative of demoting appellant to the position of shop planner.

The Board noted that although *Douglas* involved only misconduct cases, it is also applicable to cases involving performance. However, citing *Van Gilder v. Department of the Air Force*, MSPB Docket No. DE07528010082 at 4 (February 22, 1982), the Board explained that "such factors as the employee's past disciplinary record, past work record, and the adequacy and effectiveness of alternative sanctions are not equally applicable to performance cases." Pointing out that overemphasizing one factor is inappropriate, the Board determined that the presiding official gave too much weight to the agency's failure to consider alternative sanctions.

Because of the presiding official's error, the Board considered appellant's affirmative defenses, including his allegation that the agency erred in counting counseling sessions as previous disciplinary incidents. Though the Board agreed with appellant's assertion that agency procedures consider counseling as a non-disciplinary corrective action and unappealable, it noted that neither the agency's procedures nor the law prohibits the agency from basing an enhanced penalty on incidents of counseling. Thus, the Board found appellant's claim of harmful procedural error without basis.

In considering the reasonableness of the penalty in appellant's case, the Board explained that its role in reviewing penalties, as described in *Douglas*, includes considering relevant factors in the particular case. The Board stated that in appellant's case, these factors included his past performance, his length of service, and the deficiencies in his performance as a planner and estimator. The Board reviewed the record, which revealed that appellant, in hampering the efficiency of the shipyard and in making errors which caused the expenditure of additional funds, performed inadequately as a planner and estimator. However, the Board also noted that in his 15½ years of service, appellant had performed satisfactorily in other positions.

The Board also considered appellant's allegations that he had not been previously disciplined for poor performance and that other planners had made similar mistakes but had not been disciplined. The Board pointed out that the agency presented evidence that although appellant had not been previously disciplined, he had been given a warning for poor performance. Further, the agency successfully rebutted appellant's testimony concerning instances in which planning errors were made but did not result in disciplining of employees. The Board reviewed the agency's reasons for demoting appellant—lack of attention to his job, failure to take his duties seriously, failure to try to perform to the best of his ability—and noted that such characteristics were inappropriate for an employee in a responsible and important position and that appellant's supervisors had apparently lost confidence in his ability to perform satisfactorily. Accordingly, the Board found the penalty of demotion reasonable, reversed the initial decision, and sustained the agency's action.

DIANE D'ELIA v. DEPARTMENT OF THE TREASURY

(Docket No. DC07528110488)
November 22, 1982

1.345; 1.368

Appellant was suspended for 30 days for misuse of a government vehicle. According to the record, appellant had the use of a General Services Administration vehicle while on temporary duty in Atlanta, Georgia. The agency contended that appellant improperly used the vehicle when she stopped at a disco on her way back to her motel after dinner. When appellant appealed the suspension to the Board's regional office, the presiding official reversed the agency's action. The agency filed a petition for review, disagreeing with the presiding official's interpretation of pertinent regulations. Further, the agency argued that "deviation from route between official business locations is not required to establish misuse of a government vehicle" and that "to establish such a rule would have substantial impact on government beyond the impact in this appeal."

The Board reviewed the agency's "Handbook of Employee Responsibilities and Conduct," and noted its warning that "employees are prohibited from using government vehicles for other than official purposes." The Board noted that although this publication did not define what "official purposes" were, the agency's "Travel Handbook" defined the phrase as follows:

> . . . transportation between places of temporary duty; between places of duty and temporary lodging; and when public transportation is unavailable or its use is impracticable, between places of duty or temporary lodging and suitable eating places, drugstore, barber shops, places of worship, cleaning establishments, and similar places necessary for the sustenance, comfort, or health of the employee.

The Board agreed with the presiding official's finding that appellant did not misuse the vehicle when she stopped at the disco on the return route to the motel. However, it did not agree with the agency's argument that the initial decision makes deviation from route a requirement to establish misuse. Instead, the Board viewed the presiding official's consideration of whether appellant deviated from her route as "simply one of the circumstances to be considered in determining the overall nature of the trip." Therefore, the Board ordered the agency to cancel appellant's suspension.

JOHN FARRELL v. VETERANS ADMINISTRATION

(Docket No. BN07528110216)
November 26, 1982

1.310; 1.400; 3.1322; 7.410; 7.430

Appellant was removed from the position of housekeeping aid for failing to report for overtime duty as scheduled. According to the record, appellant agreed with his supervisor to report for overtime duty on a Saturday and was placed on a formal schedule to work that day. However, appellant neither reported for duty that day nor called his supervisor to notify him that he would be absent. When the Board's regional office considered the matter, it reversed the agency's action, finding that under the collective bargaining agreement, appellant was not obligated to work that day. Subsequently, the agency petitioned for review.

The Board noted that appellant and the agency disagreed about the terms of the collective bargaining agreement—appellant contending that under the agreement, he was not required to report for duty because the work slated for that overtime period was routine, not emergency. The agency argued that the collective bargaining agreement was not applicable to appellant's situation, since the agreement concerned only mandatory overtime, not voluntary overtime. Reviewing the pertinent provision of the collective bargaining agreement and assuming that it applied to voluntary overtime, the Board noted that it required that "one (1) day advance notice to work overtime shall be given" and that "an employee has the right to be excused from overtime." The Board stated that because appellant volunteered to work, or gave notice of his intent to work, "the requirement . . . that the agency give one day advance notice to appellant to work overtime was not necessary." However, the Board stated that the agreement did require that "once an employee had been scheduled to work . . . in order for that employee to be excused from overtime, he had to request that the agency excuse him from duty." Because appellant failed to do so, the Board determined that the agency's charges against him were proper.

In applying *Douglas v. Veterans Administration*, MSPB Docket No. AT075299006 (April 10, 1981), to appellant's case, the Board noted that the seriousness of appellant's offense, his past disciplinary and work records, and his potential for rehabilitation were relevant factors to consider in determining whether the penalty of removal was appropriate. Pointing out that appellant's conduct was serious, since it disrupted the efficiency of the service, the Board noted that appellant had been employed by the agency for only two and one-half years and that he had a lengthy disciplinary record. The Board also stated that the agency had previously tried to remove appellant, but because he was undergoing alcohol rehabilitation, had suspended him instead, obtaining an agreement from him that a further incident of absence without leave (AWOL) would lead to his removal. Noting that appellant's overtime offense occurred just two weeks after the agreement about any future AWOL offenses, the Board determined that appellant had not shown a potential for rehabilitation. Accordingly, the Board found the penalty of removal reasonable; it reversed the initial decision and affirmed the agency action removing appellant.

LOUIS T. JOHNSON v. DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION (Docket No. DC075281F0998)

November 10, 1982.

1.310; 1.640; 4.212; 8.290

Appellant was removed from the position of air traffic control specialist for participation in a strike against the United States government and for absence without leave (AWOL). According to the record, appellant received his notice of removal on August 7, 1981 and called his supervisor the following day to ask if he could return to work. Appellant explained that he had not reported for duty because he had been frightened by the reaction of another air traffic controller when he told that controller that he would not support a strike. Appellant's supervisor told him that he was too late to return to work but that he could appear for an interview to respond to the proposed removal notice. Later appellant's supervisor overheard a threatening CB radio transmission about appellant's return to his worksite for the interview and reported the substance of that transmission to appellant.

Appellant appealed his removal to the Board's regional office. At the hearing, several witnesses testified that appellant genuinely seemed to be in fear for his life. In the initial decision, the presiding official stated that appellant "had suffered personal problems which left him ill-equipped to deal with union pressure." The presiding official concluded that appellant did not withhold his services in concert with others, but that he involuntarily remained absent from work because he was afraid. Thus, the presiding official found that appellant had successfully rebutted the agency's *prima facie* showing that he had participated in the strike. The presiding official sustained the AWOL charge but reversed the removal and ordered the agency to substitute a two-day suspension; subsequently, the agency petitioned for review.

The agency questioned the standard used by the presiding official in considering whether appellant's fear that strikers would retaliate against him and his family was sufficient reason to render his absence from work involuntary. The Board rejected the agency's argument that the standard for duress involving criminal activity should be applied in appellant's case, finding such standard inappropriate, since an adverse action appeal is not a criminal proceeding. Further, the Board compared the test for duress in civil actions, but found that standard too liberal in light of the serious nature of the charge that a federal employee joined in a strike against the government. The Board stated that

> . . . allegations of menacing tones or language . . . fear of "financial ruin" . . . or jeopardy to career advancement . . . exuberant moral suasion . . . or any vexation, annoyance or pressure resulting in a state of mental perturbation, reluctance to act . . . or a choice of inherently unpleasant situations . . . may not suffice to render involuntary appellant's alleged participation in this case.

The Board cited as a more appropriate standard for the coercion defense, an employee's refusal to cross a picket line as a matter of principle as opposed to a refusal to do so out of fear. Citing *Duckett and Yardley v. Tennessee Valley Authority*, MSPB Docket No. AT07528010325 (February 19, 1982) and *Jones v. Tennessee Valley Authority*, MSPB Docket No. AT07528010300 (February 19, 1982), the Board explained that in order to establish a defense of coercion, the employee must demonstrate that his failure to report for work was the result of a threat of physical danger "which a person of ordinary firmness would not be expected to resist." The Board cited several cases in which employees reported for work for several days during which a strike was being held but were physically prevented by strikers from entering their worksite on a subsequent day. The Board noted that these employees also provided evidence of violence and mob action by strikers and that coworkers testifying on their behalf corroborated specific incidents of harassment. Accordingly, the Board found that the employees had successfully rebutted the agency's *prima facie* case of strike participation; however, it could not make such finding in appellant's case.

The Board noted that the evidence concerning the CB transmission, which included a veiled threat towards appellant, but pointed out that the transmission occurred after appellant had already received the notice concerning his unauthorized absence from work. Further, the Board noted that the record indicated no evidence of violence against non-strikers at the facility which employed appellant and that 70 of 120 controllers reported for work during the strike. The Board also pointed out that appellant made no attempt to contact his supervisor before August 8 to explain his absence. Therefore, the Board found that appellant did not meet the standard for coercion and thus did not rebut the *prima facie* showing of strike participation. Accordingly, the Board reversed the initial decision and sustained appellant's removal.

MATTHEW KNUCKLES v. U.S. POSTAL SERVICE
(Docket No. SL075299049)
November 19, 1982

1.369; 1.400; 1.410; 1.430; 4.320

Charged with converting $86.08 in postal funds to his own use and failing to follow proper Postal Service procedures regarding postage due mail, appellant was removed from the position of distribution, window and markup clerk. Upon appellant's appeal, the Board's regional office sustained the agency's action. However, the Board reopened the case on its own motion, found the criminal charges against appellant unsupported by the record, and remanded the case to the regional office for further proceedings. The presiding official again sustained the removal, and subsequently, the Board denied the petition for review filed by appellant. Appellant then appealed to the United States Court of Appeals which remanded the case to the Board for consideration of several issues. Upon the court's remand, the presiding official found that appellant had failed to follow Postal Service accountability methods, that appellant had not violated pertinent parts of the agency's "Employee and Labor Relations Manual," and that a 60-day suspension was a more appropriate penalty than removal.

The agency petitioned for review, questioning the presiding official's finding that appellant was unaware of several procedures for handling postage due mail. The Board pointed out that the presiding official did find that appellant knew of one of the procedures and that he sustained the charges because of appellant's failure to follow that procedure. The Board also considered the agency's argument that since the presiding official found that shortages resulted from appellant's carelessness in handling postage due mail, he should not have mitigated the removal penalty to a 60-day suspension. However, the Board noted that the agency failed to show that appellant's accounting errors were intentional.

In considering the appropriateness of the penalty, the Board noted the agency's contention that it was consistent agency practice to discharge employees who err in their postage due transactions or who come up with shortages. However, the Board pointed out that the presiding official found that the agency had treated two employees more favorably than it had appellant when it reinstated them after proposing their removal. The Board noted that the two employees had been charged with more serious offenses than had appellant. Citing *Ramirez v. Department of the Air Force*, MSPB Docket No. DA07528010253 (December 2, 1981), the Board explained that the burden is the agency's to provide legitimate reasons for treating employees differently when evidence exists that disparate penalties are levied. The Board also stressed that the charge sustained in appellant's case was not conversion, but failure to follow proper accounting procedures. Further, the Board pointed out that appellant's claim that he was never formally trained in handling postage due mail was not contested by the agency. Therefore, the Board found that the agency failed to show that the presiding official erred in reducing the penalty.

The Board also noted the agency's contention that because of previous shortages in appellant's account, he had no potential for rehabilitation. The Board pointed out that the agency's warnings to appellant had indicated that shortages would result in his reassignment—not that his failure to follow procedures would warrant his removal. The Board pointed out that the agency did not contest the presiding official's finding that it routinely tolerated a certain amount of shortages—less than $100—and did not give reason why it did not adhere to such policy in appellant's case. Accordingly, the Board found the 60-day suspension to be a reasonable penalty and denied the agency's petition.

OTTO LIZUT v. DEPARTMENT OF THE ARMY
(Docket No. PH07528110266)
November 30, 1982

1.110; 1.120; 1.390; 11.141; 15.132; 17.400

Appellant was removed from the position of mechanical engineer based on several charges, including failure to comply with orders to undergo fitness for duty examinations. Appellant appealed to the Board's regional office, denying all charges and challenging the agency's decision to place him on enforced leave and to refuse to allow him early optional retirement following a reduction in force at the agency. Appellant also argued that he was entitled to a retroactive promotion for the work he performed before and after being placed on enforced leave.

Upon consideration of appellant's appeal, the presiding official found that the matters concerning early optional retirement and a retroactive promotion were not within Board jurisdiction. However, the presiding official did find that the agency's use of enforced leave was appealable in that it constituted a suspension of more than 14 days. Consequently, the presiding official reversed the agency's action placing appellant on enforced leave, finding that it was imposed without regard to required procedures and also reversed the removal, finding that the agency should have filed for appellant's disability retirement before taking steps to remove him. Further, the presiding official ordered the agency to require appellant to undergo a psychiatric examination and to apply for disability retirement benefits on his behalf, based on mental disability, either if he refused such examination or if such examination revealed that he was mentally unfit to work. The agency petitioned for review.

The Board determined that the presiding official properly applied the three-part test found in *Mosely v. Department of the Navy*, 4 MSPB 220 (1980), to determine that appellant's enforced leave was actually a suspension. Discussing the issue regarding disability retirement, the Board cited *Brink v. Veterans Administration*, 4 MSPB 419 (1980), and explained that an agency is obligated to determine whether an employee is totally disabled by requiring the employee to undergo a fitness for duty examination. The Board added that if an employee is totally disabled by a mental or emotional condition, the agency must apply on his behalf for disability retirement "where the employee is unable or unwilling to do so." The Board further explained that regulations protect the employee from "unwarranted fitness for duty examinations or allegations of mental incompetence brought about by whim." The Board considered the reasonableness of the agency's actions in appellant's case and pointed out that appellant's behavior could have been interpreted merely as an attitude problem or as disagreeable temperament rather than an indication of mental instability. However, based on appellant's behavior, the agency foresaw the possibility of a mental disability and thus ordered the fitness for duty examination.

According to the record, appellant refused to be examined by a psychiatrist and was against disability retirement. Noting that the available medical evidence concerning 'appellant's condition indicated that appellant had to be examined further before any conclusions could be reached, the Board found nothing to substantiate that appellant was mentally disabled for employment purposes. Thus, it concluded that the agency had no obligation to apply for appellant's disability retirement in lieu of initiating an adverse action against him. Accordingly, the Board affirmed the part of the initial decision reversing the agency's action placing appellant on enforced leave and reversed the part of the initial decision restoring appellant to his position.

RAYMOND E. SMITH v. DEPARTMENT OF THE AIR FORCE (Docket No. AT07528110764)
November 29, 1982

1.120; 14.000000

The agency filed a petition for review of the initial decision in which the presiding official reduced appellant's penalty of demotion to a 30-day suspension. Specifically, the agency questioned the presiding official's order to suspend appellant for 30 calendar days from the effective date of the demotion action, contending that such "retroactive suspension . . . would result in an employee actually having worked for a 30 day period without compensation."

In considering the petition, the Board explained that according to 5 U.S.C. §7501, a suspension is "the placing of an employee, for disciplinary reasons, in a temporary status *without duties* and pay." (Emphasis added.) The Board pointed out that during the period identified by the presiding official for suspension—30 calendar days from the effective date of the demotion—appellant was working in the position to which he had been demoted. Therefore, the Board found that appellant was not "without duties" during the suspension period and concluded that the presiding official's order violated 5 U.S.C. §7501. Accordingly, the Board affirmed the initial decision as modified and ordered the agency to restore appellant to his former position with back pay and then to suspend appellant, placing him in a status without both duties and pay for 30 days.

Attorney Fees

RALPH M. BATCHELDER v. DEPARTMENT OF THE TREASURY (Docket No. BN0752801007ADD)
November 22, 1982

14.520; 14.522; 14.525

Appellant petitioned for review of an addendum decision in which the presiding official denied appellant's request for attorney fees as not warranted in the interest of justice. Citing *Allen v. U.S. Postal Service*, 2 MSPB 582 (1980), the Board explained that in order for attorney fees to be awarded, the appellant must be the prevailing party, the award must be warranted in the interest of justice, and the fees awarded must be reasonable. The Board added that according to *Allen*, awards are warranted under certain circumstances, such as when the agency's action is clearly without merit, when the action was taken in bad faith, or when the agency knew it would not prevail on the merits.

In considering appellant's petition, the Board found him to be the prevailing party. However, stating that "the agency acted reasonably and in good faith in bringing [its] charges against appellant," the Board could not find that an award of attorney fees was warranted in the interest of justice. Discussing the first charge—that appellant failed to report the on-duty assault of a subordinate female employee—the Board noted that appellant claimed that the assault occurred off duty. Appellant contended that the agency acted in bad faith by continuing to press the charge regarding the assault after he had related his view of it to an agency investigator and in his oral reply to the charges. Finding that appellant's assertions "do not establish the type of circumstances which would show that attorney fees are warranted in the interest of justice," the Board pointed out that appellant, in essence, was contending that his statements regarding the assault should be given more credence than those of the assaulted employee. The Board found no evidence to compel the agency to do so.

The second charge was that appellant altered agency policy without proper authorization—specifically, that he banned females from overtime work unless they were accompanied by a male. Appellant contended that such a charge would not prevail on the merits, since the agency did not sufficiently inquire into the facts of the matter. However, the Board pointed out that appellant did not respond to the second charge in his oral reply, and thus presented no facts to the agency so that it could inquire further into the situation on which the charge was based. Consequently, the agency relied on allegations made by two of appellant's subordinate employees to sustain the second charge. The Board noted that although the presiding official found the charge unsupported by the record, such finding did not establish that the charge was clearly without merit.

The appellant also alleged that the agency's filing of the petition for review of the initial decision unnecessarily delayed the appeal and showed bad faith. However, the Board found appellant's contention inappropriate in light of the agency's statutory right to petition. Therefore, finding that appellant failed to show that attorney fees were warranted in the interest of justice, the Board denied his petition for review.

BRIAN J. WALLACE v. DEPARTMENT OF THE TREASURY (Docket No. NY531D8190028)
November 22, 1982

14.500; 14.510; 14.540

Appellant petitioned for review of an addendum decision denying his motion for attorney fees. According to the record, appellant's attorney claimed more than $5,000 in fees—including charges for billable hours, for the annual leave and leave without pay he used while representing appellant, and for miscellaneous photocopying, postage, and transportation expenses. However, the presiding official denied the motion, finding that 18 U.S.C. §205 precluded such award to appellant's counsel since he was a federally employed attorney.

According to 18 U.S.C. §205, a federal employee who represents anyone in a proceeding in which the United States is a party, is subject to fines and imprisonment. However, the statute does not prohibit a federal employee

> . . . from acting without compensation as agent or attorney for any person who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings.

In applying such statute to appellant's case, the Board noted his assertion that the fees requested by his attorney did not constitute compensation for personal services, but reimbursement for costs incurred because of "the Federal Government's deliberate policy of not providing adequate official time to represent its employees." The Board also noted that although appellant seemed to accept that 18 U.S.C. §205 prohibited an award for billable hours, he contended that the statute did not preclude reimbursement for costs. However, in considering whether the statute—along with 5 U.S.C. §7701(g)(1)—permitted an award of costs to federally employed attorneys representing federal employees, the Board stated that "it is clear that 18 U.S.C. §205 bars appellant's attorney from receipt of attorney fees."

The Board explained that in *O'Donnell v. Department of Interior*, 2 MSPB 604 (1980), it established criteria for finding an award of attorney fees warranted under 5 U.S.C. §7701(g)(1). The Board noted that nothing in *O'Donnell* implied "that costs are severable from an award of attorney fees *per se*." The Board determined that costs are a part of attorney fees and that an award of costs alone is not authorized by 5 U.S.C. §7701(g)(1). Accordingly, the Board affirmed the initial decision as modified.

Retirement

PHILIP S. FAMULARY v. OFFICE OF PERSONNEL MANAGEMENT (Docket No. NY08318110012)
November 4, 1982

6.100; 15.200

Appellant, a disability retirement annuitant, was found not entitled to continuance of his annuity by the Office of Personnel Management (OPM). According to the record, appellant began receiving such annuity in 1976. As required by 5 C.F.R. §831.502(c)(1), he annually reported his income from part-time work. When OPM determined that appellant had been restored to his earning capacity according to 5 U.S.C. §8837(d) and took action to cancel his annuity, appellant appealed to the Board's regional office. Consequently, the presiding official reversed OPM's decision, and OPM petitioned for review.

In its petition, OPM questioned the presiding official's interpretation of the pertinent part of the statute which states that:

> Earning capacity is deemed restored if in each of wo succeeding calendar years, the income of the annuitant from wages or self-employment or both equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement.

OPM argued that the presiding official erred in including the "cost of living adjustment" (COLA) with the base salary in computing the "current rate of pay' " and that inclusion of the COLA went against the terms of the collective bargaining agreement between the United States Postal Service and its employees.

Citing *Giesler v. Department of Transportation*, 3 MSPB 367 (1980), the Board explained its practice of treating the provisions of a collective bargaining agreement just as it would the provisions of an agency's regulations. The Board reviewed Article IX of the collective bargaining agreement between the Postal Service and its employees and found it ambiguous as to whether the COLA should be included in determining the "basic pay" of a postal worker. The Board noted that the statutory definition of base pay does not include "bonuses, allowances, overtime pay . . . pay given in addition to the base pay of the position as fixed by law or regulation" and concluded that the "only reasonable interpretation of [5 U.S.C. §8331(3)] requires the inclusion of the COLA for purposes of determining the 'current rate of pay.' "

As a point of comparison, the Board noted that for employees in the competitive and excepted service, the COLA is not among the itemized allowances, special rates of pay, and differentials which are excluded from basic pay. Further, the Board pointed out that under 5 U.S.C. §5305, "general schedule" pay is under a statutory pay system and therefore subject to adjustments by the President. Noting that the President has the authority to grant federal employees comparability pay adjustments, the Board explained that such adjustments are added to the basic pay of the position in question. The Board also pointed out that the OPM worksheet used to determine whether an annuitant has earned more than 80 percent of the current rate of pay defines "current salary" as the annual base pay of the position on December 31 of the year for which income is reported. The Board stated that according to such instructions, "OPM must consider the postal COLA for that year where the COLA has in fact become part of the base pay."

OPM argued that since it is the administrative body charged with the administration of 5 U.S.C. §8337(d), the Board should give deference to its interpretation of the statute. However, considering that comparability increases to the base pay for general schedule employees are considered base pay—not additional pay—and considering that OPM gave no legal authority for excluding the COLA from the base pay of postal workers, the Board found compelling indications that OPM's interpretation of the applicable statute was wrong. Therefore, the Board affirmed the initial decision as modified and ordered OPM to cancel its action discontinuing appellant's annuity.

Termination During Probation

CHARLES J. POMMERT v. DEPARTMENT OF THE ARMY (Docket No. PH315H8110393)
November 26, 1982

3.160; 8.3218; 10.12111; 10.1322

Appellant, a dental officer, was terminated during his probationary period for insubordination toward the dental activity commander. The charge was based on three incidents, including one occasion when appellant was being counseled about his repeated absences without leave. Appellant appealed his termination to the Board's regional office, alleging marital status discrimination. The presiding official found that although appellant established a *prima facie* case of discrimination, his insubordination was supported by the evidence and was a legitimate nondiscriminatory reason for terminating him. Therefore, the presiding official dismissed the appeal for lack of jurisdiction.

The Board denied appellant's petition for review, but reopened his case on its own motion to consider the matter of marital status discrimination. Reviewing the record, the Board noted that appellant's allegation of discrimination stemmed from the agency's refusal to allow him, a divorced parent, to leave early to tend to his children. The Board pointed out that appellant's "allegation of marital status discrimination is not based on his status as single but rather on his contention that he was entitled to leave early, despite the absence of accrued leave, because of family obligations." Thus, the Board pointed out that appellant's need to leave early had nothing to do with his being single or divorced, but resulted from his responsibility for the care of his children. Noting that all parents, regardless of their marital status, had such a responsibility, the Board could not find that the agency's failure to grant appellant's request to leave early constituted marital status discrimination. Therefore, the Board found that the presiding official erred in finding that appellant established a *prima facie* case of discrimination. The Board affirmed the initial decision as modified and dismissed the appeal for lack of jurisdiction.

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NOTES ON KEY NUMBERS

In each issue, summarized Board orders, as well as other issuances listed under "Board Orders," are indexed according to the key number system used in the published volumes, *Decisions of the United States Merit Systems Protection Board*. The index numbers, which indicate the subjects found in the decision, are listed after the order date. There are 18 main subject areas. These are described under "Major Topics and Scope Notes." The "Outline of Topics" divides each major topic into more specific subtopics.

MAJOR TOPICS AND SCOPE NOTES

Topic

1.000000 ADVERSE ACTIONS

Certain personnel actions are designated as "adverse actions" under Chapter 75 of the Civil Service Reform Act of 1978. This topic references Board opinions relating to the substantive law governing those actions and distinguishes other personnel actions not designated as "adverse actions" under Chapter 75. This topic also encompasses cases involving Board consideration of penalties in adverse action cases including the mitigation of penalties. Board cases concerning procedures governing adverse actions are located under *Practice and Procedure (10.000000)*, and opinions relating to jurisdictional matters have been placed under *Jurisdiction (6.000000)*. Cases regarding remedies available to the Board in adverse action cases are located in *Remedies (14.000000)*.

2.000000 CONSTITUTIONALITY

This topic references opinions in which the Board has considered constitutional aspects of cases before it. Included are claims pursuant to specific constitutional provisions, as well as claims derived from constitutional provisions, such as the right to privacy. Constitutional claims relative to discrimination are in *Discrimination (3.000000)*.

3.000000 DISCRIMINATION

This topic refers to Board cases concerning the substantive law of prohibited discrimination pursuant to the Civil Service Reform Act of 1978. Also included are cases relating to affirmative action and disparate treatment of similarly situated employees. Questions of evidence, jurisdiction, practice and procedure, and remedial action in discrimination cases are referenced in *Evidence (4.000000)*, *Jurisdiction (6.000000)*, *Practice and Procedure (10.000000)*, and *Remedies (14.000000)*, respectively.

4.000000 EVIDENCE

This topic references cases dealing with substantive rules of evidence employed by the Board, as well as cases concerning the harmful error standard in the Act. The Board is bound by statutory burdens of proof, and cases referencing the Board's interpretation of such burdens are also included here.

5.000000 FREEDOM OF INFORMATION, PRIVACY, AND SUNSHINE ACTS

This topic references Board cases relating to the Freedom of Information, Privacy, and Sunshine Acts.

6.000000 JURISDICTION

This topic includes cases in which the Board has made specific reference to jurisdiction under the Civil Service Reform Act of 1978, as well as cases dealing with issues of justiciability. Since the jurisdiction of the Board differs with respect to certain entities, this topic includes cases dealing with jurisdictional questions particularly related to such entities. Included also are Board cases dealing with its enforcement power, which is a matter of continuing jurisdiction, and cases under the Act's savings provision. Jurisdiction over appeals related to retirement is covered under *Retirement (15.000000)*.

7.000000 LABOR-MANAGEMENT RELATIONS

This topic contains cases arising under Title VII of the Act, including collective bargaining issues and the rights of individual employees. Title VII grievance procedure cases brought before the Board are also located under this topic.

8.000000 PARTICULAR EMPLOYMENT CATEGORIES

The Civil Service Reform Act of 1978 has provisions specifically applicable to certain categories of employees. This topic references cases in which the special procedural and substantive law applicable to such employee categories were discussed by the Board, and in which such special provisions were ger-

mane to the resolution of the case. Included are cases dealing with the merit pay provisions of the Act and the Senior Executive Service.

9.000000 PERFORMANCE RELATED ACTIONS

This topic references cases dealing with performance related actions under Chapter 43 of the Act, including procedural rights and standards of proof under Chapter 43, where performance appraisal systems have been implemented. Also included are cases dealing with performance appraisal actions under Chapter 75, where Chapter 43 appraisal systems have not yet been implemented.

10.000000 PRACTICE AND PROCEDURE

This is the major topic referencing cases which set out the procedural rules for matters before the Board, its administrative law judges, and its presiding officials. Matters such as timeliness and technical filing rules are included here, as well as the concepts of former adjudication and representation of parties.

11.000000 PROHIBITED PERSONNEL PRACTICES

The Civil Service Reform Act of 1978 lists merit systems principles governing the Federal work force and defines prohibited personnel practices that may not be taken against Federal employees. This topic is limited to cases in which the Board has interpreted these provisions and related matters.

12.000000 REDUCTIONS IN FORCE

This topic refers to Board cases dealing with reductions in force, including agency justifications for taking such actions and the substantive and procedural rights of employees affected.

13.000000 REGULATION REVIEW

The Civil Service Reform Act of 1978 empowers the Board to review regulations promulgated by the Office of Personnel Management and implementing regulations of other agencies. This topic references Board opinions dealing with such regulation review.

14.000000 REMEDIES

This topic references Board cases dealing with the remedial powers of the Board.

15.000000 RETIREMENT

This topic refers to Board cases involving issues relating to the retirement of Federal employees.

16.000000 SPECIAL COUNSEL

This topic references Board cases relating to the Office of Special Counsel, including the prosecution of Hatch Act cases and violations of the Federal Employees Flexible and Compressed Work Schedules Act. The filing requisites for complaints before the Special Counsel are included here, while procedural requisites in Special Counsel cases before the Board are in *Practice and Procedure (10.000000).*

17.000000 SUITABILITY AND FITNESS FOR DUTY EXAMINATIONS

This topic references cases dealing with issues of suitability. Included also are cases involving fitness-for-duty examinations.

18.000000 EMPLOYMENT PRACTICES

This topic references cases concerning the substantive law governing employment practices and distinguishes employment restrictions that are not appealable employment practices.

OUTLINE OF TOPICS

(With Key Numbers)

1.000000 Adverse Actions

1.100 Actions Considered Adverse Under 5 U.S.C. 7512

1.110	**Removal**
1.111	Involuntary Resignation or Retirement
1.120	**Suspension for more than 14 days**
1.121	Enforced Leave
1.130	**Reduction in Grade**
1.131	Involuntary Demotion
1.140	**Reduction in Pay**
1.150	**Furlough of 30 days or less**
1.160	**Adverse Action by Office of Personnel Management**

1.200 Actions Not Considered Adverse Under 5 U.S.C. 7512

1.210	**Suspension for less than 14 days**
1.220	**Letter of Reprimand**
1.230	**Actions Based on Unacceptable Performance**
1.231	Denial of Within-Grade Step Increase
1.232	Reduction in Grade
1.233	Removal
1.240	**Reduction in Force**
1.250	**Reduction in Rank**

1.300 Substantive Charges

1.310	**Attendance Related**
1.311	Absence Without Leave
1.312	Abuse of Leave
1.313	Tardiness
1.314	Efficiency of the Service—Attendance
1.320	**Alcohol and Drug Related**
1.321	On-Duty Conduct
1.322	Off-Duty Conduct
1.330	**Criminal Conduct**
1.331	On-Duty Conduct
1.3311	Criminal Charges
1.3312	Criminal Conviction
1.332	Off-Duty Conduct
1.3321	Criminal Charges
1.3322	Criminal Conviction
1.340	**Dishonest Work Related Conduct**
1.341	Bribery
1.342	Embezzlement
1.343	Falsification
1.3431	Medical Record
1.3432	Employment Applications
1.3433	Time and Work Records
1.344	Fraud
1.345	Misappropriation and/or Misuse of Government Property
1.346	Malfeasance in Office
1.350	**Prohibited Political Activity**
1.360	**Other Work Related Charges**
1.361	Abuse of Authority
1.3611	Sexual Harassment
1.3612	Prohibited Discrimination
1.362	Conflict of Interest
1.363	Insubordination
1.3631	Refusal to Accept Reassignment
1.364	Gross Waste
1.365	Creation of Danger to Public Health and Safety
1.366	Insolence
1.367	Violence
1.368	Unauthorized Activities

1.369 "Failure to" Charges
1.370 Charges Related to Off-Duty Conduct
1.371 Efficiency of the Service
1.3711 Nexus
1.380 Classification and Qualifications Requirements
1.390 Performance Related

1.400 BOARD CONSIDERATION OF PENALTIES

1.410 Mitigation of Penalty
1.420 Prior Disciplinary Record
1.430 Disparate Treatment of Similarly Situated Employees

1.500 PROCEDURAL RIGHTS IN ADVERSE ACTIONS

1.510 Notice
1.511 Crime Provision
1.512 Emergency Suspension During Notice Period
1.513 Reasons
1.520 Reply
1.521 Written Reply
1.522 Oral Reply
1.530 Review of Materials on Which Action Based
1.540 Right to Representation
1.550 Proposing and Deciding Official
1.560 Appeal to Merit Systems Protection Board
1.561 Burden of Proof
1.562 Efficiency of the Service—Generally
1.570 Decision

1.600 DEFENSE

1.610 Stale Charges
1.620 Mental Conditions
1.630 Animus
1.640 Coercion

2.000000 Constitutionality

2.100 DUE PROCESS

2.110 Liberty Rights or Interest
2.120 Property Rights or Interest
2.130 Requisite Administrative Procedures

2.200 CRIMINAL CONSTITUTIONAL CONSIDERATIONS

2.210 Self-Incrimination
2.220 Right to Counsel
2.230 Double Jeopardy

2.300 FIRST AMENDMENT FREEDOMS

2.310 Freedom of Speech
2.311 Relation of Efficiency of the Service
2.3111 Defamation
2.312 Balancing Test
2.313 Mixed Motive
2.320 Freedom of Religion
2.321 Relation of Efficiency of the Service
2.3211 Free Exercise
2.3212 Establishment

2.400 RIGHT TO PRIVACY

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3.100 PROHIBITED DISCRIMINATION

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3.111	Age Discrimination in Employment Act of 1967, 29 U.S.C. 631, 633a
3.120	**Race, Color, and National Origin Discrimination**
3.121	Civil Rights Act of 1964, 42 U.S.C. 2000e-16
3.130	**Handicap Discrimination**
3.131	Handicapping Condition
3.1311	Physical Disability
3.1312	Mental Disability
3.1313	Alcoholism and Drug Abuse
3.132	Rehabilitation Act of 1973, 29 U.S.C. 791
3.1321	Reasonable Accommodation
3.13211	Undue Hardship
3.1322	Rehabilitation
3.133	Qualified Handicapped Employee
3.140	**Sex Discrimination**
3.141	Civil Rights Act of 1964, 42 U.S.C. 2000e-16
3.142	Fair Labor Standards Act of 1938, 29 U.S.C. 206(d)
3.143	Sexual Preference
3.144	Sexual Harassment
3.150	**Religious Discrimination**
3.151	Civil Rights Act of 1964, 42 U.S.C. 2000e-16
3.160	**Marital Status Discrimination**
3.170	**Discrimination on the Basis of Political Affiliation**

3.200 DISPARATE TREATMENT OF SIMILARLY SITUATED EMPLOYEES

3.300 AFFIRMATIVE ACTION

3.310	**Minorities**
3.320	**Handicapped Persons**
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3.400 BURDENS OF PROOF

3.410	**Prima Facie Case**
3.420	**Legitimate Non-discriminatory Reason**
3.430	**Pretext**

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4.100 ADMISSIBILITY

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4.111	Admissions
4.112	Affidavits
4.113	Evidence Obtained Through Discovery
4.1131	Depositions
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4.1133	Documents
4.114	Best Evidence
4.115	Polygraphs
4.116	Handwriting
4.120	**Testimony**
4.121	Relevancy
4.122	Materiality
4.123	Privileged Matter
4.124	Hearsay
4.125	Credibility
4.126	Perjury
4.127	Probative Value
4.128	Circumstantial Evidence
4.129	Opinion

4.130 Official Notice
4.131 Facts
4.132 Documents
4.140 Evidence of Prior Disciplinary Actions
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4.200 BURDENS OF PROOF

4.210 Preponderance of the Evidence
4.211 Agency Burden
4.212 Appellant's Burden
4.220 Substantial Evidence
4.230 Arbitrary, Capricious, or Abuse of Discretion
4.240 Reasonable Grounds to Believe
4.250 Burden of Persuasion
4.260 Burden of Going Forward

4.300 HARMFUL ERROR

4.310 Agency Procedures
4.320 Presiding Official's Rulings

5.000000 FOI, Privacy, and Sunshine Acts

5.100 SUNSHINE ACT

5.200 FREEDOM OF INFORMATION ACT

5.210 Exemptions
5.211 Internal Personnel Rules and Practices
5.212 Statutory Exemptions
5.213 Inter- and Intra-Agency Memoranda and Letters
5.214 Personnel and Medical Files

5.300 PRIVACY ACT

5.310 Form of Request
5.320 Denial of Access
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6.000000 Jurisdiction

6.100 MERIT SYSTEMS PROTECTION BOARD JURISDICTION

6.110 Original Jurisdiction
6.111 Special Counsel Cases
6.112 Senior Executive Service Removals
6.113 Employee Disciplinary Actions under the Federal Employee Flexible and Compressed Work Schedules Act
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6.120 Appellate Jurisdiction
6.121 Adverse Actions
6.122 Denial of Within-Grade Step Increases
6.123 Senior Executive Service Cases
6.124 Discrimination Cases
6.1241 Equal Employment Opportunity Commission
6.1242 Mixed Cases
6.1243 Special Panel
6.125 Non-Appealable Actions
6.1251 Position Classification
6.1252 Promotion
6.1253 Performance Ratings
6.1254 Reassignment
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6.1258 Grievance Decisions
6.126 Agency Regulations
6.127 Prohibited Personnel Practices
6.128 Review of Grievance Decision

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6.210 **Independent Agencies**
6.220 **Independent Establishments**
6.230 **Intelligence Agencies**
6.240 **Government Corporations**

6.300 PRESIDING OFFICIAL'S JURISDICTION

6.310 **Generally**
6.320 **Finality of Decisions**
6.330 **Appeals of Presiding Official Decisions**

6.400 OFFICE OF PERSONNEL MANAGEMENT

6.410 **Intervention**
6.420 **Rules and Regulations**

6.500 ENFORCEMENT

6.510 **Petitions**
6.511 Appellate Cases
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6.520 **Compliance**
6.530 **Comptroller General**

6.600 EXHAUSTION OF REMEDIES

6.700 JUSTICIABILITY

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6.730 **Real Party in Interest**
6.740 **Case or Controversy**

6.800 SAVINGS PROVISION (5 U.S.C. 1101 note)

6.900 STATUTORY CONSTRUCTION OF THE CIVIL SERVICE REFORM ACT OF 1978

7.000000 Labor-Management Relations

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7.110 **Negotiated Grievance Procedures in Collective Bargaining Agreements**
7.111 Exclusion of Specific Matters from Negotiated Grievance Procedures
7.112 Arbitration
7.113 Prohibited Personnel Practices
7.1131 Election of Statutory or Negotiated Procedure
7.1132 Right to Request Merit Systems Protection Board Review
7.114 Actions Based on Unacceptable Performance
7.1141 Election of Statutory or Negotiated Procedure
7.1142 Arbitrator governed by U.S.C. 7701(c)(1)
7.1143 Judicial Review of Arbitrator's Award
7.115 Adverse Actions
7.1151 Election of Statutory or Negotiated Procedure
7.1152 Arbitrator governed by 5 U.S.C. 7701(a)(1)
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7.312 Discrimination on the Basis of Union Membership
7.313 Sponsorship, Control or Undue Assistance to Labor Organization
7.314 Reprisal for Filing of Complaint

7.315	Failure to Negotiate in Good Faith with a Labor Organization
7.3151	Compelling Need
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7.316	Failure to Cooperate in Impasse Procedures and Decisions
7.3161	Federal Service Impasses Panel
7.317	Enforcement of Rules and Regulations in Conflict with Prior Collective Bargaining Agreement
7.3171	Prohibited Personnel Practices Exception
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7.3248	Marital Status
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7.325	Failure to Negotiate in Good Faith with Agency
7.3251	Compelling Need
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8.100 ADMINISTRATIVE LAW JUDGES

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8.113	Reduction in Grade
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8.120	**Good Cause**
8.121	Conduct and Demeanor/Judicial Temperament
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8.211	Preference Eligibles
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8.370 Employees of District of Columbia
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8.513 Limited Term Appointee
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8.5311 Procedural Requirements
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8.532 Suspensions for more than 14 Days
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8.533 Conversion of Position to Senior Executive Service
8.540 Performance Appraisal
8.550 Removal from Senior Executive Service
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8.600 MERIT PAY

8.610 Transfer of Position to Merit Pay Status

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9.100 ACTIONS BASED ON PERFORMANCE

9.110	**Denial of Within-Grade Increase**
9.120	**Reduction in Grade**
9.130	**Removal**
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9.2143	Assistance in Improving Performance
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9.300 PROCEDURAL RIGHTS IN ACTIONS BASED ON UNACCEPTABLE PERFORMANCE

9.310	**Reduction in Grade or Removals**
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9.315	Deletion of Notice from Agency Record
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9.316	Appeal Rights
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9.322	Written Decision
9.323	Timeliness
9.324	Reconsideration by Agency
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10.131	Board Reopening
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10.400 REPRESENTATION

10.410	**Pro Se**
10.420	**Attorney**
10.430	**Other Representation**
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10.600 SUBSTITUTION OF PARTIES

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10.810	**Waiver of Board Regulations**
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11.113	Forced Withdrawal from Competition
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11.115 Nepotism
11.120 Unauthorized Political Practices
11.121 Political Coercion
11.122 Political Reprisals
11.130 Prohibited Discrimination
11.131 Age
11.132 Race/Color and National Origin
11.133 Handicapping Condition
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11.151 Actions against Whistleblowers
11.1511 Definition of Gross Waste of Funds
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11.152 Reprisals Against Whistleblowers
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11.161 Nexus to Efficiency of the Service
11.170 Actions in Violation of Merit Systems Principles
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11.210 Definition of Personnel Action
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12.000000 Reductions in Force

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12.111 Change of Positions or Reclassification
12.112 Grade Retention
12.113 Pay Retention
12.114 Retreat Rights
12.115 Remedial Actions
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12.120 Furlough
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12.210 Competitive Area
12.220 Competitive Level
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12.310 Transfer of Employees

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12.530 Reorganization
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13.000000 Regulation Review

13.100 OFFICE OF PERSONNEL MANAGEMENT RULES AND REGULATIONS

13.110 Facial Invalidity
13.120 Agency Implementation

14.000000 Remedies

14.100 REINSTATEMENT

14.110 Backpay

14.200 CIVIL PENALTY

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14.300 CEASE AND DESIST ORDER

14.400 CORRECTIVE ACTION

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14.521 Prohibited Personnel Practice
14.522 Clearly Without Merit
14.523 Bad Faith
14.5231 Harassment
14.5232 Improper Pressure
14.524 Gross Procedural Error by Agency
14.525 Agency Direct or Indirect Knowledge of Lack of Merit
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FOR YOUR INFORMATION

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DEFINITIONS

These definitions are provided for clarification purposes only and are not intended to convey the strict legal meaning of the term.

Deciding Official—the official who renders the agency's decision.

Regional Office—the Board office authorized to receive appeals from the area where the appellant's duty station was located when the agency action was taken; there are 11 MSPB regional offices.

Initial Decision—the regional office decision made by the presiding official in response to a petition for appeal. The initial decision becomes final in 35 days unless a petition for review is filed with the Board and granted. In that case, the Board's decision becomes the final decision. If the petition for review is denied, the initial decision becomes final five days after the issuance of the denial.

Petition for Appeal—the request filed with a Board regional office for review of an agency action.

Petition for Review—the request filed with the three-member Board in Washington, D.C., for review of an initial decision of a presiding official.

Presiding Official—any person designated by the Board to preside over any hearing or to make a decision on the record. The presiding official referred to in the DIGEST summaries is usually a Board regional office official designated by the Board to perform these duties.

Proposing Official—the agency official who initiates an action to be taken against an employee.

Addendum Decision—an addendum decision deals with attorney fees.

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UNITED STATES MERIT SYSTEMS PROTECTION BOARD

Washington, D.C. 20419

MS 1.11:

United States Merit Systems Protection Board

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ADVERSE ACTIONS

JAMES BANKS and HAROLD E. FAULKNER v. FEDERAL AVIATION ADMINISTRATION (Docket Nos. DA07528010296 and DA07528010206)
December 30, 1982

2.100; 4.000000; 4.211; 10.1213[*]

The court remanded appellants' case to the Board, which had sustained the agency's action removing appellants from their air traffic controller positions for use of cocaine. According to the record, appellants voluntarily submitted urine samples to the agency for laboratory analysis, and tests revealed metabolites of cocaine in the samples. The samples were destroyed before appellants could have them independently tested. However, the presiding official found that testimony established the accuracy of the lab tests and thus declined to impose sanctions against the agency for failure to produce the urine samples.

Upon review, the Board found that the agency's failure to produce the samples "was not sufficiently prejudicial to appellants' ability to support their defense so as to require sanctions." However, the Court of Appeals determined "that due process required an opportunity by the controllers to test on their own behalf to evaluate the accuracy of the government-sponsored tests." Moreover, the court held that because appellants' opportunity to prepare a credible defense was hampered, the results of the laboratory tests should be suppressed. Therefore, finding the record lacking evidence to support the removals, the court reversed the Board's decision and remanded the case for further proceedings. Upon re-examination of the record, the Board reversed the initial decision and ordered the agency to cancel the removals.

HARRY E. BREWSTER v. DEPARTMENT OF THE NAVY (Docket No. DC07528090248)
December 15, 1982

1.410; 10.133

When appellant was removed from the position of civil engineer for unsatisfactory performance, he appealed his removal to the Board's regional office. The presiding official sustained the agency's action, appellant filed a petition for review, and the Board remanded the case to the regional office for consideration of the reasonableness of the penalty under *Douglas v. Veterans Administration*, MSPB Docket No. AT075299006 (April 10, 1981). Specifically, the Board directed the regional office to address "whether there was available another position at the same or lower grade level requiring less responsibility, which the appellant was qualified to fill, and in which he could be expected to perform in a fully satisfactory manner." Upon reconsideration, the presiding official found no such position available and determined that the penalty of removal was appropriate. Appellant again petitioned for review.

Though appellant did not contest the presiding official's finding that there was "no position of a lower grade or less responsibility to which the agency could have assigned the appellant in lieu of separation," he did argue that the agency was obligated to find him a vacancy in one of its installations worldwide. The Board disagreed with appellant's comparison of his situation with that of an employee who has been displaced by reduction in force, stating that taking a disciplinary action against an unsatisfactory employee is not the same. The Board, agreeing with the presiding official, held that the Civil Service Reform Act of 1978

> . . . does not require agencies to perform the type of extensive outplacement services for employees who are removed for unsatisfactory performance as appellant contends, especially in view of the fact that the agency provides no such services for employees who are performing satisfactorily.

Finding that the presiding official acted correctly by considering only positions in the administrative unit in which appellant had been employed, the Board denied appellant's petition.

ROBERT G. JOHNSON v. INTERNAL REVENUE SERVICE (Docket No. SF0752801002)
December 21, 1982

4.130; 4.210; 10.1121; 10.121; 10.1211; 10.1322

Appellant, suspended for 45 days for misuse of a government vehicle and for habitual use of intoxicants, appealed the agency's action to the Board's regional office. When the presiding official did not hold a hearing within 120 days of the filing date, appellant contended that he was prejudiced by such delay and moved for a "direct verdict." Appellant's representative informed the presiding official and the agency that appellant no longer wished to have a hearing, and the presiding official closed the record. Subsequently, the agency expressed opposition to appellant's motion, stating that his submissions constituted "a withdrawal of the appeal on the merits" and requested an opportunity to address the merits of its action if the presiding official reached them in her decision.

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[*] For an explanation of key numbers, see "Index."

In the initial decision, the presiding official did address the merits based on evidence already in the closed record. She found no evidence to support either that the vehicle in question was owned by the government or that the incidents leading to appellant's suspension established his habitual use of intoxicants. Moreover, since the incidents occurred while appellant was off duty, the presiding official determined that appellant's work performance was not affected. Thus, the presiding official found the agency's action unsupported by the evidence, and the agency petitioned for review.

The Board noted the agency's argument that it was denied its right to request a hearing. However, the Board pointed out that the agency knew of appellant's request to dispense with the hearing and of its option to request that the presiding official schedule a hearing regardless so that it could present testimony to support its action.

The Board also considered the agency's contention that the presiding official erred when she reached the merits of the case without notifying the agency. The agency claimed that because it was not notified, it did not check the appeal file for completeness and therefore inadvertently omitted the information verifying government ownership of the vehicle. The Board found "no showing that the agency was misled by the presiding official into believing that she would not reach the merits in the initial decision or that the parties would have an additional opportunity to make submissions." The Board explained that 5 C.F.R. §1201.11 requires "the issuance of an initial decision containing findings of fact and conclusions of law as to 'all the material issues of fact or law.' " Addressing the agency's charge that the presiding official erred in not requesting certain evidence, the Board explained that although the presiding official has the authority to request that evidence be produced, "that authority does not detract from the agency's responsibility for the presentation of its case before the Board." Citing *Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980), the Board pointed out that the burden of proof is the agency's. It found that the agency failed to establish the charge of appellant's unauthorized use of a government vehicle and denied the petition for review.

W. OTTO JOHNSON v. DEPARTMENT OF AGRICULTURE (Docket No. DC07528110580)

December 7, 1982

6.121; 6.710; 6.720

Appellant applied for disability retirement, and, subsequently, the agency issued a notice proposing to remove him for misconduct. While appellant's application for disability retirement was pending with the Office of Personnel Management (OPM), the agency removed appellant, and appellant appealed to the Board's regional office. When OPM approved appellant's application, the agency cancelled the removal and issued a "Change Action Notice" (AD-350), separating appellant because of disability retirement. On the form the agency made derogatory remarks about appellant's removal. The agency filed a motion to dismiss appellant's appeal of his removal, and in response to such motion, appellant requested that the remarks on the AD-350 be deleted. The presiding official dismissed appellant's appeal as moot and directed the agency to issue a corrected personnel form deleting the references to appellant's removal. The agency petitioned for review.

In its petition, the agency argued that the presiding official erroneously interpreted statute and regulations when she directed the agency to change the AD-350. The agency specifically contended that appellant's disability retirement was not the subject of his appeal and that such matter was therefore not within Board jurisdiction. Further, the agency argued that statute precluded the Board from rendering advisory opinions.

The Board agreed that if the presiding official properly ruled that the agency had canceled appellant's removal, she lacked the authority to grant the corrective action requested by appellant. The Board explained that "once the presiding official determined that the appeal was moot, she lacked further authority over the appeal since the Board is prohibited by 5 U.S.C. §1205(g) from issuing advisory opinions." However, citing *Himmel v. Department of Justice*, MSPB Docket No. PH075209135 (June 2, 1981), the Board stated that the "nature of the agency's action against a particular appellant at the time an appeal is filed with the Board is determinative of the Board's jurisdiction." According to *Himmel*, therefore, an agency's modification of its action after an employee has filed an appeal does not divest the Board of jurisdiction unless the employee consents or unless the agency rescinds the action. The Board noted that although the agency canceled the removal action, "it did not intend to cancel the underlying decision to remove appellant and restore him to the agency's rolls." In the Board's view, the agency's actions were an attempt "to divest appellant of his right of appeal while still maintaining records which were understandably objectionable to appellant." Finding that the agency's cancellation of appellant's removal was not *bona fide* and that the agency did not effect a divestiture of the Board's jurisdiction over appellant's appeal, the Board vacated the initial decision and remanded the appeal to the regional office for a new adjudication.

DEBORAH G. KIRBY v. VETERANS ADMINISTRATION (Docket No. PH07528110461)
December 7, 1982

1.390; 1.410

Appellant, a medical clerk-typist, appealed her removal for unacceptable performance to the Board's regional office. The presiding official found the charges supported by the evidence but, in light of appellant's contention that personal problems affected her performance, found the penalty of removal too severe. The presiding official reduced the penalty to a 60-day suspension, and the agency petitioned for review.

The Board noted that according to the record, appellant started with the agency in September 1980, and the agency began documenting her performance problems two months later. The Board further noted that numerous errors in appellant's work—and appellant's reputation of unreliability—were the source of complaints from her coworkers and made re-checking of her work necessary. Also, the Board pointed out that in December 1980, appellant advised her supervisor of her personal problems, which concerned her pregnancy and a broken promise of marriage, and the supervisor counseled appellant in January 1981 about her performance. The Board noted the agency's attempts to reassign appellant to other areas. However, the record indicated that appellant objected to her reassignment to an x-ray file room, complaining that lifting x-ray jackets was causing problems with her pregnancy. Further, appellant's transfer to a job filing x-rays in folders did not yield an improvement in her performance. When she was unable to obtain a position in any other service, the agency removed her. The Board concluded that such action was reasonable. Accordingly, the Board affirmed the initial decision as modified and sustained appellant's removal.

PATRICIA D. PRICE v. DEPARTMENT OF THE ARMY (Docket No. AT07528110660)
December 6, 1982

1.390; 3.430

The agency removed appellant for unacceptable performance of various duties. Specifically, the agency contended that she was deficient in her responsibilities to assist visitors, to receive telephone calls, to type correspondence and standard forms, to proofread and make corrections, to file, and to distribute mail. When appellant appealed her removal to the Board's regional office, the presiding official found that although appellant's performance was deficient, the agency had not shown that it had provided training for her so that she could perform her duties adequately. Based on the agency's failure to train her, the presiding official found that the agency had treated appellant disparately from another employee, and thus had committed a prohibited personnel practice, discriminating against her on the basis of race. The presiding official reversed the agency's action, and the agency petitioned for review. Also, the Office of Personnel Management (OPM) filed an intervenor brief.

Citing *Cho v. Dwight David Eisenhower Army Medical Center*, MSPB Docket No. AT043209005 at 6-8 (September 9, 1981), the Board stated that it had "explicitly rejected the contention that . . . an agency is obligated to provide training before removing an employee for unsatisfactory performance." The Board explained that in *Cho*, it found no laws or regulations requiring training. The Board noted, as had OPM in its brief, that an agency's obligation is to determine the training needs of its employees, not to train a particular individual. Noting that the record did indicate that appellant's work was inadequate, the board determined that the agency had sustained the charge of unsatisfactory performance.

In considering whether the agency had committed a prohibited personnel practice because it trained a Caucasian employee but did not train appellant, the Board pointed out that in order for an agency to be in violation of 5 U.S.C. §2302(b)(6), it must take preferential action with the purpose of improving one employee or injuring another. The Board found no such evidence of a prohibited personnel practice in appellant's case. In comparing appellant's treatment to that of the employee in question, the Board found that she and appellant were not similarly situated. The Board noted that appellant was a GS-3 seasonal clerk-typist, the other employee, a GS-4 full-time employee; the other employee excelled at her job, appellant performed poorly. Noting that appellant never requested specific training, the Board pointed out that she had basic secretarial skills and that her problems were not related to skill, but to attitude. Further, the Board pointed out that the other employee's training was not remedial, but to expand her already excellent skills. Therefore, the Board was unable to find that appellant was denied training because of her race. The Board reversed the initial decision and sustained appellant's removal.

ROBERT E. PULLEY v. DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION (Docket Nos. PH07528110048 and PH07528110440)
December 1, 1982

1.120; 1.400; 4.310

Appellant was placed on enforced leave, then removed, for threatening the lives of his supervisor and another employee. The record indicated that after making threats on August 28, 1980, appellant returned to work on September 3 and was allowed to perform his duties until midday September 4, when he was placed on administrative leave. On September 8, he was notified that as of September 15, he would be on enforced leave. Subsequently, appellant was removed on April 17, 1981.

When appellant appealed to the Board's regional office, the presiding official issued initial decisions on both of the actions. The presiding official found that the enforced leave constituted a suspension of more than 14 days, and, thus, that the agency committed a prohibited personnel practice by instituting the enforced leave. Further, although the presiding official found that the agency had proved the charge against appellant, he determined that the penalty of removal was unwarranted. Thus, the presiding official reduced the penalty to a 90-day suspension. The agency petitioned for review of both initial decisions.

The Board explained that according to *Mosely v. Department of the Navy*, 4 MSPB 221 (1980), determining that enforced leave constitutes suspension depends upon whether, the appellant was placed on leave without his consent, whether appellant was willing and able to work during that leave period, and whether the enforced leave was disciplinary. The Board noted that according to the record, appellant was placed on enforced leave without his consent, though he was willing to work—and did return to work five days after he made the threats. The Board further noted that not only did the agency allow appellant to perform his duties for a day and a half, but it also permitted him to work for the same person he had threatened just days earlier. Also, the Board agreed with the presiding official's finding that the agency imposed the enforced leave for disciplinary reasons. Therefore, the Board determined that appellant "met the three *Mosely* criteria and his placement on enforced leave constituted a suspension." Finding that the agency committed harmful error when it suspended appellant without adhering to 5 U.S.C. §7513, the Board could not sustain the agency's action placing him on enforced leave.

Concerning appellant's removal, the Board found that the presiding official erred in reducing the removal penalty to a 90-day suspension, based on appellant's clean disciplinary record and satisfactory work record. The Board stated that appellant's threat to shoot his supervisor and a coworker in the head was a serious offense affecting the efficiency of the service and the agency's responsibility to keep the workplace safe. The Board thus found the penalty of removal appropriate. Accordingly, the Board affirmed as modified the initial decision regarding enforced leave and ordered the agency to cancel appellant's suspension for the period September 15, 1980-April 17, 1981. However, the Board reversed the initial decision regarding removal and sustained appellant's removal.

MICHAEL R. ROBINSON v. U.S. POSTAL SERVICE (Docket No. CH07528110262)
December 27, 1982

4.320; 10.1322

Appellant was removed from the position of city carrier for failing to discharge his duties properly which resulted in delay of the mails. According to the record, the agency took its action because on the day in question, appellant returned to the station early after having delivered only about 15 percent of the mail. While appellant claimed that sidewalks were impassable, a subsequent investigation revealed that most sidewalks were passable. When appellant appealed to the Board's regional office, the presiding official found that the agency had established the charge against appellant and that the penalty was warranted. Consequently, appellant petitioned for review.

Considering appellant's allegation that the transcript of the hearing contained errors, the Board explained that it would not review a record based on the mere assertion of error. The Board pointed out that according to *Weaver v. Department of the Navy*, 2 MSPB 297 (1980), "the petitioning party must . . . explain in the petition why the challenged factual determination is incorrect, and identify the specific evidence in the record which demonstrates the error," The Board determined that appellant had not met the criteria necessary to justify a review.

The Board agreed with appellant's allegation that despite his indication on the appeal form, the issue of discrimination was never discussed. The Board explained that §1201.151(b) states its policy "to adjudicate impartially, thoroughly and fairly all issues raised under this subpart" and to "allow appellants an opportunity to raise allegations of discrimination during the appeals process." The Board added that §1201.153 outlines requirements for petitions raising issues of prohibited discrimination. Stating that appellant complied with the pertinent provisions, the Board found that the presiding official erred in not addressing the matter of discrimination.

The Board noted that instead of basing his allegation on specific grounds, such as discrimination because of race or sex, appellant stated that he was discriminated against because management would not accept his excuses for using sick leave. Therefore, though the presiding official erred in not addressing appellant's allegation, the Board stated that it was also necessary to consider whether such error was harmful so as to justify a review of the initial decision. Determining that appellant's allegation of discrimination "was a general statement not based on any of the acceptable grounds for discrimination," the Board found that the presiding official's error had not affected appellant's substantive rights. Accordingly, it denied the petition for review.

CEPHAS J. SWEET v. DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION (Docket No. PH07528110342)
December 6, 1982

3.1321; 10.111

Appellant was first demoted for physical inability to perform the duties of his position, then removed for absence without leave (AWOL). According to the record, because appellant suffered a work-related injury, the agency gave him light duty for four and one-half years at his doctor's recommendation. When the agency directed appellant to obtain a fitness-for-duty examination, the examination revealed that appellant's impairment would continue to prevent him from performing the duties of his warehouseman position. Consequently, the agency reassigned appellant to the position of supply clerk, an action which constituted a demotion. Though appellant was entitled to retain his warehouseman salary, he objected to his reassignment because the job was located in a building without a medical unit or a cafeteria. When appellant refused to report for work, the agency removed him.

Appellant appealed to the Board's regional office, alleging handicap discrimination. The presiding official sustained the removal and dismissed the appeal of the demotion as untimely filed. In a petition for review, appellant's counsel questioned the dismissal of the demotion appeal, claiming that appellant's lack of education established good cause for waiving the time limits for filing an appeal. Noting that appellant—without help from counsel—filed a timely appeal of his removal, the Board found no reason to disturb the presiding official's dismissal of the demotion appeal. The Board also considered appellant's allegation of handicap discrimination, noting the argument of appellant's counsel that the demotion and removal were unjustified because appellant successfully performed the duties of warehouseman for four and one-half years. However, the Board noted that appellant was placed on light-duty status and performed minimum functions—not the full range of duties of warehouseman. Further, the Board determined that the lack of a medical unit and a cafeteria at the new worksite was no reason for appellant to refuse reassignment. Thus, the Board found that "the agency had no obligation to retain appellant in his former position and, in fact, made every reasonable effort to accommodate appellant's physical handicap."

Regarding the charge of AWOL, the Board noted the contention of appellant's counsel that appellant should have been placed on sick or administrative leave instead. Pointing out that appellant was not sick according to 5 C.F.R. §630.401, the Board found no evidence that appellant ever requested sick leave. Further, the Board noted that appellant continued to report for duty at his former worksite. Finding that the agency's placement of appellant in AWOL status was proper, the Board denied the petition for review.

PERFORMANCE

RAJINDER S. BAJWA v. DEPARTMENT OF AGRICULTURE (Docket No. DC531D8210383)
December 21, 1982

4.320; 9.110; 9.213; 9.2141

Finding appellant's performance not at an acceptable level of competence (ALOC) during the 156-week waiting period, the agency withheld his within-grade increase. Appellant appealed to the Board's regional office, alleging that the agency should have placed greater emphasis on the latter part of appellant's waiting period during which his performance was acceptable. The presiding official found that the agency's action withholding appellant's within-grade increase was supported by the record. Appellant petitioned for review.

The Board explained that under 5 C.F.R. §531.408, agencies must inform employees of what specifically constitutes ALOC in their positions "at the beginning of the appraisal period or within a reasonable time after initial appointment or permanent change in position." The Board added that 5 C.F.R. §531.409 requires that an ALOC determination reflect an employee's performance "during the waiting period except when an employee has not been informed of the specific requirements for performance at an acceptable level of competence at least thirty days before the end of a waiting period." In such case, as the Board explained, the ALOC determination is postponed, the employee is informed of his performance requirements, and the ALOC determination is made after the employee has the opportunity to demonstrate performance. Applying these requirements to appellant's case, the Board pointed out that according to the record, appellant knew what was expected of him throughout the waiting period and that in appellant's case, the agency was required to base the ALOC determination on appellant's performance during the entire waiting period. Finding "no error in the agency's determination that the acceptable performance at the end of the waiting period was outweighed by the earlier poor performance," the Board denied the petition.

PRACTICES AND PROCEDURES

GARY L. LYNN v. DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION (Docket No. CH07528210184)
December 15, 1982

4.200; 10.000000; 10.112; 10.1213; 10.811

When appellant was removed, he appealed to the Board's regional office, and, by order dated December 30, 1981, the regional office ordered the agency to respond to the appeal within 15 calendar days of receipt of the order. Although the regional office informed the agency of recently amended Board rules regarding service requirements for pleadings, the agency submitted a request for an extension of time but failed to furnish the required number of copies and to certify that it had served appellant's representative. The agency resubmitted its request for an extension of time until January 22, and the regional office granted it. However, the agency's response was received after the extended time had ended. Therefore, by order dated February 3, 1982, the regional office directed the agency to show cause why sanctions should not be imposed for its failure to comply with the order to file a timely response.

The agency offered several reasons for its untimely response—that its personnel branch caused delays in assembling the case file, that the amount of time it sought in the extension was insufficient, and that it did not receive notice that the extension was granted until January 28. However, the presiding official concluded that the agency failed to exercise due diligence in complying with Board requirements. Noting that the agency took no action to assemble the case file until shortly before the due date and that it neglected to request a further extension, the presiding official found sanctions warranted. Accordingly, the presiding official struck from consideration the evidence included in the agency's response, concluded that the agency failed to support the charge, and reversed appellant's removal. The agency petitioned for review.

The Board noted the agency's argument that to reinstate appellant would constitute granting a default judgment against the United States. Since the presiding official made a determination on the merits of appellant's case and found the agency's action unsupported by the evidence, the Board found the agency's argument unsubstantiated. Although the agency questioned the imposition of sanctions, the Board held that "presiding officials have authority to impose sanctions upon parties as necessary to serve the ends of justice." Noting that the regional office fully informed the agency of service and timeliness requirements, the Board found that the agency's conduct warranted the imposition of sanctions, that the agency failed to prove its charges, and that the presiding official's reversal of the removal was proper.

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COURT CASES

RAICOVICH v. U.S. POSTAL SERVICE. No. 81-1788, slip op (D.C. Cir., April 16, 1982)*

The court vacated the Board's decision to affirm the agency's refusal to restore appellant after recovery from a job injury more than one year after compensation benefits commenced, after finding that the decision was not in accordance with law.

After suffering a disabling injury while on the job, appellant received disability compensation while continually absent from work. After 14 months the agency removed him because of continued absence exceeding one year. He continued receiving disability benefits for six additional years and then requested reinstatement based on a medical examination indicating he was fit for reemployment.

The agency denied appellant's request as not in its best interest. The basis for denial was a review of appellant's previous work record consisting of three disciplinary suspensions (one for two days, one for 14 days, and one for 30 days); ten job-related accidents; and an indication that appellant abused sick leave. However, there were no charges pending against appellant at the time of the disabling injury and there had been no effort to remove him prior to that time. In addition, there was no evidence that the ten accidents were willful, and nothing to suggest that appellant abused sick leave.

The presiding official rejected appellant's argument that a previous work record can be considered in such cases only when a disciplinary action, possibly resulting in removal, was pending at the time of the compensable injury. The presiding official instead said "the more reasonable standard is whether the agency can reasonably expect the recovered employee to be competent and effective. To the extent that a . . . previous work record aids . . . that determination, it may be considered." The presiding official concluded that appellant's previous work record justified the agency's refusal to reemploy him. The Board affirmed the initial decision upon petition for review.

The court, in its opinion, explained the history and the basis in law and regulation for the reemployment of recovered disabled employees. Title 5 U.S.C. §8151(b)(1) guarantees reemployment to injured employees recovering within one year, and §8151(b)(2) accords priority reemployment to those whose disability exceeds one year and requires that all reasonable efforts to reemploy them be made.

Under 5 C.F.R. §353.07, an applicant for reemployment pursuant to 5 U.S.C. §8151(b)(2) is entitled to "priority consideration," which is in the case of the Postal Service defined by 5 C.F.R. §302. Section 302.202 requires agencies to establish and publish "qualification standards such as relating to experience, training, citizenship, minimum age, physical condition, etc. which relate to the duties to be performed."

The Board cited its recent decision of *Thompson v. U.S. Postal Service*, DA035399002 (March 26, 1981) as precedent for its final decision to reject appellant's reemployment application. Although the court agreed that *Thompson* was, for relevant purposes, indistinguishable from the present case, it nevertheless voiced its disagreement with the Board's conclusion in *Thompson* by vacating the decision in the present case.

The court found that it would be inconsistent with the statutory purpose of §8151(b)(2) for an agency to refuse to rehire a recovered former employee on the basis of prior conduct for which he was not dismissed. It explained that the agency failed to meet the statutory obligation of making "all reasonable efforts to place" appellant and by such means "accord [him] priority" when it made no effort to place him in his former or equivalent position and denied his application for reinstatement while hiring other applicants with no prior U.S. Postal Service association.

The court further said that to allow an agency to disregard its statutory obligation because of an applicant's past misconduct which never resulted in dismissal would pervert the statute by permitting a form of double punishment for the same misdeed in the guise of implementing a statute intended to confer additional benefits on injured workers.

The court examined the agency's actions with regard to the Office of Personnel Management's regulations at 5 C.F.R. §302 and found that in order for the regulatory language "priority consideration" to be consistent with the statutory language "priority in placing," any interpretation must include both procedural and substantive priority. Consequently, priority consideration requires that a former employee in good standing at the time of his injury, who was not engaged in egregious behavior of the sort described in 5 C.F.R. §302.203 must be placed on an appropriate priority employment list and considered for reemployment when vacancies arise.

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*Periodically, the DIGEST will include summaries of court cases involving Board decisions, or other relevant cases.

The court finally stated that a 5 U.S.C. §8151(b)(2) applicant may only be disqualified from restoration for the same conduct that would have justified his discharge if he were continuously employed.

STEVENS v. TENNESSEE VALLEY AUTHORITY, No. 80-3763, slip op (6th Cir., Sept. 1, 1982)

The court set aside the Board's decision upholding the agency's denial of veterans reemployment rights.

While working on a nuclear plant construction project for the Tennessee Valley Authority (TVA), appellant was called to active duty in the National Guard on November 29, 1978. After his departure, TVA routinely terminated his employment because of his unavailability for work. Upon his return from active duty on August 20, 1979, appellant requested restoration to his former position.

TVA denied the request but offered him a new job. However, he was unable to obtain the necessary union referral for the new job and eventually obtained other employment.

The Board upheld the agency's action, finding that appellant was not entitled to restoration under 38 U.S.C. §2021 and 2024 because his former position was a "temporary position." In reaching that decision, the Board made no detailed findings of fact and held no evidentiary hearing. It relied on terminology in the collective bargaining agreement between TVA and the union, which designated all trades and labor or construction positions as temporary.

Upon appeal from the Board's denial of appellant's petition for review, the court found that the Board erred in reaching its decision. The court stated that although an employer can create both temporary and non-temporary positions, it cannot simply designate a position as temporary if the characteristics of the position make it non-temporary. Therefore, for purposes of "reemployment rights," the employer or the Board must examine all the relevant characteristics of the position to determine if it is temporary, not simply the designation given to it by the employer or the contract.

The court then considered the question of what is the appropriate test for determining whether a position is "other than temporary" within the meaning of the Vietnam Era Veterans' Readjustment Assistance Act, 38 U.S.C. §2021. It agreed with other courts, including the Supreme Court, that the appropriate test, as described in *Moe v. Eastern Airlines*, 246 F2d 215, is whether the veteran, prior to his entry into military service, had a reasonable expectation, in light of all the circumstances of his employment, that his employment would continue for a significant or indefinite period. The fact that employment forseeably will come to an end at some time in the future does not, by itself, exclude veterans from invoking the statutory right to reemployment.

The court further discussed certain circumstances and situations in other courts' decisions which may be considered in determining whether a position is temporary or non-temporary. Because the Board conducted no hearing and made virtually no findings of fact to support its conclusion, the court was unable to say whether appellant's position with TVA was temporary or non-temporary.

The court concluded that, because the Board failed to consider those factors required to be considered by the Act, and failed to apply the correct legal standard, the decision was not supported by substantial evidence, was arbitrary and was not in accordance with law.

The court set aside the Board's decision under 5 U.S.C. §7703(c)(1) and (3) and remanded for further proceedings.

INDEX

NOTES ON KEY NUMBERS

In each issue, summarized Board orders, as well as other issuances listed under "Board Orders," are indexed according to the key number system used in the published volumes, *Decisions of the United States Merit Systems Protection Board*. The index numbers, which indicate the subjects found in the decision, are listed after the order date. There are 18 main subject areas. These are described under "Major Topics and Scope Notes." The "Outline of Topics" divides each major topic into more specific subtopics.

MAJOR TOPICS AND SCOPE NOTES

Topic

1.000000 ADVERSE ACTIONS

Certain personnel actions are designated as "adverse actions" under Chapter 75 of the Civil Service Reform Act of 1978. This topic references Board opinions relating to the substantive law governing those actions and distinguishes other personnel actions not designated as "adverse actions" under Chapter 75. This topic also encompasses cases involving Board consideration of penalties in adverse action cases including the mitigation of penalties. Board cases concerning procedures governing adverse actions are located under *Practice and Procedure (10.000000)*, and opinions relating to jurisdictional matters have been placed under *Jurisdiction (6.000000)*. Cases regarding remedies available to the Board in adverse action cases are located in *Remedies (14.000000)*.

2.000000 CONSTITUTIONALITY

This topic references opinions in which the Board has considered constitutional aspects of cases before it. Included are claims pursuant to specific constitutional provisions, as well as claims derived from constitutional provisions, such as the right to privacy. Constitutional claims relative to discrimination are in *Discrimination (3.000000)*.

3.000000 DISCRIMINATION

This topic refers to Board cases concerning the substantive law of prohibited discrimination pursuant to the Civil Service Reform Act of 1978. Also included are cases relating to affirmative action and disparate treatment of similarly situated employees. Questions of evidence, jurisdiction, practice and procedure, and remedial action in discrimination cases are referenced in *Evidence (4.000000)*, *Jurisdiction (6.000000)*, *Practice and Procedure (10.000000)*, and *Remedies (14.000000)*, respectively.

4.000000 EVIDENCE

This topic references cases dealing with substantive rules of evidence employed by the Board, as well as cases concerning the harmful error standard in the Act. The Board is bound by statutory burdens of proof, and cases referencing the Board's interpretation of such burdens are also included here.

5.000000 FREEDOM OF INFORMATION, PRIVACY, AND SUNSHINE ACTS

This topic references Board cases relating to the Freedom of Information, Privacy, and Sunshine Acts.

6.000000 JURISDICTION

This topic includes cases in which the Board has made specific reference to jurisdiction under the Civil Service Reform Act of 1978, as well as cases dealing with issues of justiciability. Since the jurisdiction of the Board differs with respect to certain entities, this topic includes cases dealing with jurisdictional questions particularly related to such entities. Included also are Board cases dealing with its enforcement power, which is a matter of continuing jurisdiction, and cases under the Act's savings provision. Jurisdiction over appeals related to retirement is covered under *Retirement (15.000000)*.

7.000000 LABOR-MANAGEMENT RELATIONS

This topic contains cases arising under Title VII of the Act, including collective bargaining issues and the rights of individual employees. Title VII grievance procedure cases brought before the Board are also located under this topic.

8.000000 PARTICULAR EMPLOYMENT CATEGORIES

The Civil Service Reform Act of 1978 has provisions specifically applicable to certain categories of employees. This topic references cases in which the special procedural and substantive law applicable to such employee categories were discussed by the Board, and in which such special provisions were ger-

mane to the resolution of the case. Included are cases dealing with the merit pay provisions of the Act and the Senior Executive Service.

9.000000 PERFORMANCE RELATED ACTIONS

This topic references cases dealing with performance related actions under Chapter 43 of the Act, including procedural rights and standards of proof under Chapter 43, where performance appraisal systems have been implemented. Also included are cases dealing with performance appraisal actions under Chapter 75, where Chapter 43 appraisal systems have not yet been implemented.

10.000000 PRACTICE AND PROCEDURE

This is the major topic referencing cases which set out the procedural rules for matters before the Board, its administrative law judges, and its presiding officials. Matters such as timeliness and technical filing rules are included here, as well as the concepts of former adjudication and representation of parties.

11.000000 PROHIBITED PERSONNEL PRACTICES

The Civil Service Reform Act of 1978 lists merit systems principles governing the Federal work force and defines prohibited personnel practices that may not be taken against Federal employees. This topic is limited to cases in which the Board has interpreted these provisions and related matters.

12.000000 REDUCTIONS IN FORCE

This topic refers to Board cases dealing with reductions in force, including agency justifications for taking such actions and the substantive and procedural rights of employees affected.

13.000000 REGULATION REVIEW

The Civil Service Reform Act of 1978 empowers the Board to review regulations promulgated by the Office of Personnel Management and implementing regulations of other agencies. This topic references Board opinions dealing with such regulation review.

14.000000 REMEDIES

This topic references Board cases dealing with the remedial powers of the Board.

15.000000 RETIREMENT

This topic refers to Board cases involving issues relating to the retirement of Federal employees.

16.000000 SPECIAL COUNSEL

This topic references Board cases relating to the Office of Special Counsel, including the prosecution of Hatch Act cases and violations of the Federal Employees Flexible and Compressed Work Schedules Act. The filing requisites for complaints before the Special Counsel are included here, while procedural requisites in Special Counsel cases before the Board are in *Practice and Procedure (10.000000).*

17.000000 SUITABILITY AND FITNESS FOR DUTY EXAMINATIONS

This topic references cases dealing with issues of suitability. Included also are cases involving fitness-for-duty examinations.

18.000000 EMPLOYMENT PRACTICES

This topic references cases concerning the substantive law governing employment practices and distinguishes employment restrictions that are not appealable employment practices.

OUTLINE OF TOPICS

(With Key Numbers)

1.000000 Adverse Actions

1.100 Actions Considered Adverse Under 5 U.S.C. 7512

1.110	**Removal**
1.111	Involuntary Resignation or Retirement
1.120	**Suspension for more than 14 days**
1.121	Enforced Leave
1.130	**Reduction in Grade**
1.131	Involuntary Demotion
1.140	**Reduction in Pay**
1.150	**Furlough of 30 days or less**
1.160	**Adverse Action by Office of Personnel Management**

1.200 Actions Not Considered Adverse Under 5 U.S.C. 7512

1.210	**Suspension for less than 14 days**
1.220	**Letter of Reprimand**
1.230	**Actions Based on Unacceptable Performance**
1.231	Denial of Within-Grade Step Increase
1.232	Reduction in Grade
1.233	Removal
1.240	**Reduction in Force**
1.250	**Reduction in Rank**

1.300 Substantive Charges

1.310	**Attendance Related**
1.311	Absence Without Leave
1.312	Abuse of Leave
1.313	Tardiness
1.314	Efficiency of the Service—Attendance
1.320	**Alcohol and Drug Related**
1.321	On-Duty Conduct
1.322	Off-Duty Conduct
1.330	**Criminal Conduct**
1.331	On-Duty Conduct
1.3311	Criminal Charges
1.3312	Criminal Conviction
1.332	Off-Duty Conduct
1.3321	Criminal Charges
1.3322	Criminal Conviction
1.340	**Dishonest Work Related Conduct**
1.341	Bribery
1.342	Embezzlement
1.343	Falsification
1.3431	Medical Record
1.3432	Employment Applications
1.3433	Time and Work Records
1.344	Fraud
1.345	Misappropriation and/or Misuse of Government Property
1.346	Malfeasance in Office
1.350	**Prohibited Political Activity**
1.360	**Other Work Related Charges**
1.361	Abuse of Authority
1.3611	Sexual Harassment
1.3612	Prohibited Discrimination
1.362	Conflict of Interest
1.363	Insubordination
1.3631	Refusal to Accept Reassignment
1.364	Gross Waste
1.365	Creation of Danger to Public Health and Safety
1.366	Insolence
1.367	Violence
1.368	Unauthorized Activities

1.369 "Failure to" Charges
1.370 Charges Related to Off-Duty Conduct
1.371 Efficiency of the Service
1.3711 Nexus
1.380 Classification and Qualifications Requirements
1.390 Performance Related

1.400 BOARD CONSIDERATION OF PENALTIES

1.410 Mitigation of Penalty
1.420 Prior Disciplinary Record
1.430 Disparate Treatment of Similarly Situated Employees

1.500 PROCEDURAL RIGHTS IN ADVERSE ACTIONS

1.510 Notice
1.511 Crime Provision
1.512 Emergency Suspension During Notice Period
1.513 Reasons
1.520 Reply
1.521 Written Reply
1.522 Oral Reply
1.530 Review of Materials on Which Action Based
1.540 Right to Representation
1.550 Proposing and Deciding Official
1.560 Appeal to Merit Systems Protection Board
1.561 Burden of Proof
1.562 Efficiency of the Service—Generally
1.570 Decision

1.600 DEFENSE

1.610 Stale Charges
1.620 Mental Conditions
1.630 Animus
1.640 Coercion

2.000000 Constitutionality

2.100 DUE PROCESS

2.110 Liberty Rights or Interest
2.120 Property Rights or Interest
2.130 Requisite Administrative Procedures

2.200 CRIMINAL CONSTITUTIONAL CONSIDERATIONS

2.210 Self-Incrimination
2.220 Right to Counsel
2.230 Double Jeopardy

2.300 FIRST AMENDMENT FREEDOMS

2.310 Freedom of Speech
2.311 Relation of Efficiency of the Service
2.3111 Defamation
2.312 Balancing Test
2.313 Mixed Motive
2.320 Freedom of Religion
2.321 Relation of Efficiency of the Service
2.3211 Free Exercise
2.3212 Establishment

2.400 RIGHT TO PRIVACY

3.000000 Discrimination

3.100 PROHIBITED DISCRIMINATION

3.110	**Age Discrimination**
3.111	Age Discrimination in Employment Act of 1967, 29 U.S.C. 631, 633a
3.120	**Race, Color, and National Origin Discrimination**
3.121	Civil Rights Act of 1964, 42 U.S.C. 2000e-16
3.130	**Handicap Discrimination**
3.131	Handicapping Condition
3.1311	Physical Disability
3.1312	Mental Disability
3.1313	Alcoholism and Drug Abuse
3.132	Rehabilitation Act of 1973, 29 U.S.C. 791
3.1321	Reasonable Accommodation
3.13211	Undue Hardship
3.1322	Rehabilitation
3.133	Qualified Handicapped Employee
3.140	**Sex Discrimination**
3.141	Civil Rights Act of 1964, 42 U.S.C. 2000e-16
3.142	Fair Labor Standards Act of 1938 29 U.S.C. 206(d)
3.143	Sexual Preference
3.144	Sexual Harassment
3.150	**Religious Discrimination**
3.151	Civil Rights Act of 1964, 42 U.S.C. 2000e-16
3.160	**Marital Status Discrimination**
3.170	**Discrimination on the Basis of Political Affiliation**

3.200 DISPARATE TREATMENT OF SIMILARLY SITUATED EMPLOYEES

3.300 AFFIRMATIVE ACTION

3.310	**Minorities**
3.320	**Handicapped Persons**
3.330	**Women**

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3.410	**Prima Facie Case**
3.420	**Legitimate Non-discriminatory Reason**
3.430	**Pretext**

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4.100 ADMISSIBILITY

4.110	**Prehearing Evidence**
4.111	Admissions
4.112	Affidavits
4.113	Evidence Obtained Through Discovery
4.1131	Depositions
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4.1133	Documents
4.114	Best Evidence
4.115	Polygraphs
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4.120	**Testimony**
4.121	Relevancy
4.122	Materiality
4.123	Privileged Matter
4.124	Hearsay
4.125	Credibility
4.126	Perjury
4.127	Probative Value
4.128	Circumstantial Evidence
4.129	Opinion

4.130 Official Notice
4.131 Facts
4.132 Documents
4.140 Evidence of Prior Disciplinary Actions
4.150 Stipulations

4.200 BURDENS OF PROOF

4.210 Preponderance of the Evidence
4.211 Agency Burden
4.212 Appellant's Burden
4.220 Substantial Evidence
4.230 Arbitrary, Capricious, or Abuse of Discretion
4.240 Reasonable Grounds to Believe
4.250 Burden of Persuasion
4.260 Burden of Going Forward

4.300 HARMFUL ERROR

4.310 Agency Procedures
4.320 Presiding Official's Rulings

5.000000 FOI, Privacy, and Sunshine Acts

5.100 SUNSHINE ACT

5.200 FREEDOM OF INFORMATION ACT

5.210 Exemptions
5.211 Internal Personnel Rules and Practices
5.212 Statutory Exemptions
5.213 Inter- and Intra-Agency Memoranda and Letters
5.214 Personnel and Medical Files

5.300 PRIVACY ACT

5.310 Form of Request
5.320 Denial of Access
5.321 Appeal Rights

6.000000 Jurisdiction

6.100 MERIT SYSTEMS PROTECTION BOARD JURISDICTION

6.110 Original Jurisdiction
6.111 Special Counsel Cases
6.112 Senior Executive Service Removals
6.113 Employee Disciplinary Actions under the Federal Employee Flexible and Compressed Work Schedules Act
6.114 Administrative Law Judges
6.120 Appellate Jurisdiction
6.121 Adverse Actions
6.122 Denial of Within-Grade Step Increases
6.123 Senior Executive Service Cases
6.124 Discrimination Cases
6.1241 Equal Employment Opportunity Commission
6.1242 Mixed Cases
6.1243 Special Panel
6.125 Non-Appealable Actions
6.1251 Position Classification
6.1252 Promotion
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6.1254 Reassignment
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6.126 Agency Regulations
6.127 Prohibited Personnel Practices
6.128 Review of Grievance Decision

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6.210 **Independent Agencies**
6.220 **Independent Establishments**
6.230 **Intelligence Agencies**
6.240 **Government Corporations**

6.300 PRESIDING OFFICIAL'S JURISDICTION

6.310 **Generally**
6.320 **Finality of Decisions**
6.330 **Appeals of Presiding Official Decisions**

6.400 OFFICE OF PERSONNEL MANAGEMENT

6.410 **Intervention**
6.420 **Rules and Regulations**

6.500 ENFORCEMENT

6.510 **Petitions**
6.511 Appellate Cases
6.512 Original Cases
6.520 **Compliance**
6.530 **Comptroller General**

6.600 EXHAUSTION OF REMEDIES

6.700 JUSTICIABILITY

6.710 **Mootness**
6.720 **Ripeness**
6.730 **Real Party in Interest**
6.740 **Case or Controversy**

6.800 SAVINGS PROVISION (5 U.S.C. 1101 note)

6.900 STATUTORY CONSTRUCTION OF THE CIVIL SERVICE REFORM ACT OF 1978

7.000000 Labor-Management Relations

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7.110 **Negotiated Grievance Procedures in Collective Bargaining Agreements**
7.111 Exclusion of Specific Matters from Negotiated Grievance Procedures
7.112 Arbitration
7.113 Prohibited Personnel Practices
7.1131 Election of Statutory or Negotiated Procedure
7.1132 Right to Request Merit Systems Protection Board Review
7.114 Actions Based on Unacceptable Performance
7.1141 Election of Statutory or Negotiated Procedure
7.1142 Arbitrator governed by U.S.C. 7701(c)(1)
7.1143 Judicial Review of Arbitrator's Award
7.115 Adverse Actions
7.1151 Election of Statutory or Negotiated Procedure
7.1152 Arbitrator governed by 5 U.S.C. 7701(a)(1)
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7.300 UNFAIR LABOR PRACTICES

7.310 **Agency Unfair Labor Practices**
7.311 Interference with Exercise of Employee's Rights
7.312 Discrimination on the Basis of Union Membership
7.313 Sponsorship, Control or Undue Assistance to Labor Organization
7.314 Reprisal for Filing of Complaint

7.315	Failure to Negotiate in Good Faith with a Labor Organization
7.3151	Compelling Need
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7.316	Failure to Cooperate in Impasse Procedures and Decisions
7.3161	Federal Service Impasses Panel
7.317	Enforcement of Rules and Regulations in Conflict with Prior Collective Bargaining Agreement
7.3171	Prohibited Personnel Practices Exception
7.318	Failure to Comply with any Provisions of Title 5, Chapter 71
7.320	**Labor Organization Unfair Labor Practices**
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7.324	Discrimination Against Employees with Regard to Membership
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7.3243	National Origin
7.3244	Sex
7.3245	Age
7.3246	Preferential Civil Service Status
7.3247	Political Affiliation
7.3248	Marital Status
7.3249	Handicapping Condition
7.325	Failure to Negotiate in Good Faith with Agency
7.3251	Compelling Need
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7.326	Failure to Cooperate in Impasse Procedures and Decisions
7.3261	Federal Service Impasses Panel
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7.410	**Enforcement of Provisions**
7.420	**Right of Representation**
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8.100 ADMINISTRATIVE LAW JUDGES

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8.115	Furlough of 30 days or less
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8.200 PARTICULAR FEDERAL ENTITIES

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8.211	Preference Eligibles
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8.230	**Law Enforcement Personnel**
8.231	Federal Bureau of Investigation
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8.3411	Veterans Readjustment Appointees
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8.410	**Military Duty**
8.420	**Employment Related Injuries**
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8.510	**Types of Positions**
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8.513	Limited Term Appointee
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8.515	General Position
8.520	**Actions Within the Senior Executive Service**
8.521	Reassignment
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8.530	**Appealable Actions**
8.531	Removals
8.5311	Procedural Requirements
8.5312	Efficiency of the Service
8.53121	Nexus
8.532	Suspensions for more than 14 Days
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8.533	Conversion of Position to Senior Executive Service
8.540	**Performance Appraisal**
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8.600 MERIT PAY

8.610	**Transfer of Position to Merit Pay Status**

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9.100 ACTIONS BASED ON PERFORMANCE

9.110	**Denial of Within-Grade Increase**
9.120	**Reduction in Grade**
9.130	**Removal**
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9.212	Employee Participation in Establishment of Performance Standards
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9.2141	Acceptable Level of Competence Determinations
9.2142	Recognition and Awards
9.2143	Assistance in Improving Performance
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9.3151	Performance Acceptability for One Year
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10.111	Filing of Appeal and Request for Hearing
10.1111	Right to Hearing
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10.2111 Filing of Complaint
10.2112 Rights of Employees in 5 U.S.C. 1206(g) Disciplinary Actions
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10.400 Representation

10.410	**Pro Se**
10.420	**Attorney**
10.430	**Other Representation**
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10.500 Ex Parte Conduct

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10.800 General Board Powers

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11.000 Practices Prohibited

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11.113	Forced Withdrawal from Competition
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11.120 Unauthorized Political Practices
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11.132 Race/Color and National Origin
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11.141 For Exercising Appeal Rights
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11.151 Actions against Whistleblowers
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11.152 Reprisals Against Whistleblowers
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11.161 Nexus to Efficiency of the Service
11.170 Actions in Violation of Merit Systems Principles
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12.111 Change of Positions or Reclassification
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12.115 Remedial Actions
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12.210 Competitive Area
12.220 Competitive Level
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FOR YOUR INFORMATION

DIGEST

The DIGEST is a monthly publication containing summaries of Board orders and a list of other Board orders and issuances. It is available from the Superintendent of Documents on either a subscription or single issue basis. Please address subscription or purchase inquiries to: Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

INITIAL DECISIONS

Initial decisions made in the regional offices are available on microfiche. The microfiche and its indexes may be viewed in the library at the Board's central office. To subscribe to the microfiche "Federal Employee Appeals Decisions" at $150 per year for microfiche and index, contact the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

PUBLISHED BOARD DECISIONS AND INDEX

Decisions of the United States Merit Systems Protection Board (Volumes 1 and 2) and *Index to Decisions of the United States Merit Systems Protection Board* are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402 at $30 for the three-volume set; Stock No. 062-000-00002-3. Covering the period of January 11, 1979 through July 22, 1980, these volumes consist of final actions taken by the Board after the issuance of an initial decision in an appeal from an agency action, Board actions in cases where it has original jurisdiction, and precedential interlocutory actions. In most cases, the preceding initial or recommended decision is included. The cases are indexed in the accompanying multi-part index volume.

Volumes 3 and 4 (including multi-part index) are available from the Superintendent of Documents at $25 for the two-volume set; Stock No. 062-000-00009-1. These volumes consist of Board final actions taken under the appellate and original jurisdiction conferred by the Civil Service Reform Act of 1978, and precedential interlocutory actions from July 23, 1980 through December 31, 1980.

BOARD ORDERS

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DEFINITIONS

These definitions are provided for clarification purposes only and are not intended to convey the strict legal meaning of the term.

Deciding Official—the official who renders the agency's decision.

Regional Office—the Board office authorized to receive appeals from the area where the appellant's duty station was located when the agency action was taken; there are 11 MSPB regional offices.

Initial Decision—the regional office decision made by the presiding official in response to a petition for appeal. The initial decision becomes final in 35 days unless a petition for review is filed with the Board and granted. In that case, the Board's decision becomes the final decision. If the petition for review is denied, the initial decision becomes final five days after the issuance of the denial.

Petition for Appeal—the request filed with a Board regional office for review of an agency action.

Petition for Review—the request filed with the three-member Board in Washington, D.C., for review of an initial decision of a presiding official.

Presiding Official—any person designated by the Board to preside over any hearing or to make a decision on the record. The presiding official referred to in the DIGEST summaries is usually a Board regional office official designated by the Board to perform these duties.

Proposing Official—the agency official who initiates an action to be taken against an employee.

Addendum Decision—an addendum decision deals with attorney fees.

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